147 U.S. 396

RECORD, CASE No. 14,981.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1022.

WILLIAM HARMAN, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED FEBRUARY 24, 1892.

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a UNITED STATES OF AMERICA, *Northern District of Illinois, Northern Division,* } ss:

The United States of America to the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said supreme court, between William Harmon, plaintiff in error, and The City of Chicago, defendant in error, in an action of assumpsit, a manifest error hath happened, to the great damage of the said William Harman, plaintiff in error, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second day of March, A. D. 1892, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of February, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the 116th year.

WM. H. BRADLEY,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

[Endorsed:] Supreme Court of the United States. William Harman, plaintiff in error, *vs.* The City of Chicago, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office.

b In the Supreme Court of Illinois, Northern Grand Division.

WILLIAM HARMON *vs.* CITY OF CHICAGO. } Appeal from Appellate Court of Illinois, First District.

I, Alfred H. Taylor, clerk of said court, do hereby certify that on the fourth day of February, in the year 1892, a copy of the foregoing writ of error for the defendants in error was lodged in my office, at Ottawa.

Witness my hand and the seal of this court this fourth day of February, A. D. 1892.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

A. H. TAYLOR, *Clerk.*

c UNITED STATES OF AMERICA, *ss:*

WILLIAM HARMAN, Plaintiff in Error,
vs.
CITY OF CHICAGO, Defendant in Error.

To The City of Chicago, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the first day of March, 1892, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, in the northern grand division thereof, wherein William Harman is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment of the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Benjamin D. Magruder, chief justice of the supreme court of the State of Illinois, this 2nd day of February, in the year of our Lord one thousand eight hundred ninety-two.

BENJAMIN D. MAGRUDER,
Chief Justice of the Supreme Court of Illinois.

Service of the within citation on The City of Chicago, defendant in error, by copy thereof, is this day received. Dated February 2nd, 1892.

JOHN S. MILLER,
Corporation Counsel for City of Chicago.

d In the Supreme Court of Illinois, Northern Grand Division.

WILLIAM HARMON
vs.
CITY OF CHICAGO. } Appeal from Appellate Court of Illinois, First District.

I, Alfred H. Taylor, clerk of said court, do hereby certify that on the fourth day of February, in the year 1892, a copy of the foregoing citation and return was lodged in my office, at Ottawa.

Witness my hand and the seal of this court this fourth day of February, A. D. 1892.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

A. H. TAYLOR, *Clerk.*

e In the Supreme Court of Illinois, Northern Grand Division.

WILLIAM HARMON
vs.
CITY OF CHICAGO. } Appeal from Appellate Court of Illinois, First District.

I, Alfred H. Taylor, clerk of the supreme court of Illinois for the northern grand division, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from one to seventy-eight, inclusive, contain a true and

complete transcript and copy of the record and proceedings had in said court in the case which is above entitled and of the whole thereof, including the opinion of the court, as the same remain of record and on file in my said office.

In testimony whereof I have hereunto set my hand and caused the seal of the said supreme court of Illinois to be hereunto affixed, at Ottawa, in said State, this fourth day of February, in the year of our Lord one thousand eight hundred and ninety-two.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

A. H. TAYLOR, *Clerk.*

1 State of Illinois Supreme Court, Northern Grand Division.

At a supreme court begun and held at Ottawa on Tuesday, the seventh day of October, in the year of our Lord one thousand eight hundred and ninety, within and for the northern grand division of the State of Illinois.

Present: John Scholfield, chief justice; Alfred M. Craig, justice; Simeon P. Shope, justice: Benj. D. Magruder, justice; Joseph M. Bailey, justice; David J. Baker, justice; Jacob W. Wilkins, justice; George Hunt, attorney general; Lawrence Morrissey, sheriff; Alfred H. Taylor, clerk.

Be it remembered that heretofore, to wit, on the 12th day of September, A. D. 1890, there was filed in the clerk's office of said court a certain transcript of the record and proceedings of the circuit court of Cook county in words and figures following, to wit:

2 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
County of Cook, }

Pleas before the Honorable Richard S. Tuthill, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the eighteenth day) of November, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

Present: Honorable Richard S. Tuthill, one of the judges of the circuit court of Cook county, State of Illinois; Richard S. Tuthill, State's attorney; Canute R. Matson, sheriff.

Attest. HENRY BEST, *Clerk.*

Be it remembered that heretofore, to wit, on the 5th day of October, A. D. 1888, there was filed in said court a certain præcipe and there issued out of and under the seal of said court the people's writ of summons, directed to the sheriff of Cook county to execute; which said præcipe and writ, with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

3 STATE OF ILLINOIS, } ss:
County of Cook, }

Circuit Court of Cook County, —— Term, A. D. 188–.

Præcipe.

WILLIAM HARMAN, Plaintiff, }
vs. } Damages, $500.00.
CITY OF CHICAGO, Defendant. }

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of assumpsit, to the damage of said plaintiff in the sum of five hundred dollars, direct the same to the sheriff of Cook county to execute, and make it returnable to the November term of said court, A. D. 188–.

SCHUYLER & KREMER,
Plaintiff's Attorneys.

To Henry Best, Esq., clerk.
Chicago, Oct. 5, 1888.

Summons.

STATE OF ILLINOIS, } ss:
Cook County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon City of Chicago, if it shall be found in your county, personally to be and to appear before the circuit court of Cook county on the first day of the term thereof to be holden at the court-house, in the city of Chicago, in said
4 Cook county, on the third Monday of November, 1888, to answer unto Wm. Harman in a plea of trespass on the case upon promises, to the damage of said plaintiff, as it is said, in the sum of five hundred dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Henry Best, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 5th day of October, A. D. 1888.

[SEAL.] HENRY BEST, *Clerk.*

Endorsed: P'd 1.00.

Served this writ on the within-named defendant, City of Chicago, by delivering a copy thereof to John A. Roche, mayor of said city, the 5th day of October, 1888.

CANUTE R. MATSON, *Sheriff,*
By W. A. JOHNSON, *Deputy.*

And afterwards, to wit, on the 10th day of October, A. D. 1888, there was filed in said cause a certain declaration, which is in the words and figures following, to wit:

Declaration.

In the Circuit Court of Cook County, November Term, A. D. 1888.

5 STATE OF ILLINOIS, } ss:
Cook County, }

William Harman, plaintiff in this suit, by Schuyler & Kremer, his attorneys, complains of The City of Chicago, defendant in this suit, summoned, etc., of a plea of trespass on the case on promises—

For that whereas the said defendant heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and eighty-eight, at Chicago, to wit, at the county aforesaid, became and was indebted to the said plaintiff in the sum of five hundred dollars, of lawful money of the United States of America, for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendant and at the special instance and request of the said defendant, and being so indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiff had before that time at the like special instance and request of the said defendant sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant
6 would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise at the time of the sale and delivery thereof were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiff aver- that the said goods, wares, and merchandise last mentioned at the time of the sale and delivery thereof were reasonably worth the further sum of five hundred dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year and at the place aforesaid, had notice.

And whereas, also, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, was indebted to the said plaintiff in the further sum of five hundred dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant and at the like request of the said defendant; and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the like request of the said defendant; and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff;

and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff; and in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and
7 at the like special request of the said defendant; and, being so indebted, the said defendant in consideration thereof afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this court mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of five hundred dollars of like lawful money as aforesaid, and, being so found in arrear and indebted to the said plaintiff, the said defendant in consideration thereof afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, etc.) has not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiff; but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and still does refuse, to the damage of the said plaintiff of five hundred dollars, and therefore the said plaintiff brings suit, etc.

8 SCHUYLER & KREMER,
Plaintiff's Attorneys.

Copy of Instrument and Account Sued on.

The City of Chicago to William Harmon, Dr.

To money paid by plaintiff to defendant under protest and while plaintiff was under arrest, at the instance of the defendant, for a license to keep, use, or let for hire in the Chicago river and harbor of Chicago the steam tug-boats "Tom Brown," "F. S. Butler," "J. H. Hackley," "C. W. Parker," "Bob Teed," "A. B. Ward," "W. H. Wolf," "Crawford," "G. B. McClellan," "Mary McLane," "Success," and "Wauburn," of which the said plaintiff was owner and manager	$300 00

The City of Chicago to William Harmon, Dr.

To goods, wares, and merchandise sold and delivered	$500
To money lent and advanced	500
To money paid, laid out, and expended	500
To money had and received to and for the use of said plaintiff	500
To money due for interest and forbearance	500
To labor, services, and material	500
To balance due on account stated	500

9 And thereupon, on the 19th day of November, A. D. 1889, the following, among other, proceedings were had and entered of record in said cause, to wit:

WILLIAM HARMAN *vs.* CITY OF CHICAGO. } 68967. 5088. Assumpsit.

This day came the said parties, by their respective attorney, and by agreement submit said cause to the court for trial upon an agreed state- of facts, and thereupon the court, after hearing said evidence as agreed upon, finds the issues for the defendant; to which finding by the court the said plaintiff, by his attorney, duly excepts and enters his motion to set aside said finding and for a new trial of said cause; on consideration whereof the court overrules said motion; to which ruling by the court the said plaintiff, by his attorney, duly excepts.

Wherefore it is considered by the court that said defendant go hence hereof without day and recover of said plaintiff its costs in this behalf expended, to be taxed, and have execution therefor.

To the entry of which judgment the said plaintiff, by his attorney, duly excepts and prays an appeal to the appellate court of the first district of Illinois, which is granted on condition that said plaintiff doth within thirty days from date execute and file herein an appeal bond in the penal sum of one thousand dollars, with security to be approved by the court or by the clerk of this court; and it is further ordered that said plaintiff have thirty days from date in which to prepare and file a bill of exceptions in said cause.

10 And thereupon, on the 21st day of November, A. D. 1889, there was filed in said cause certain plea, which is in the words and figures following, to wit:

STATE OF ILLINOIS, *County of Cook,* } *ss:*

In the Circuit Court Thereof.

WILLIAM HARMON *vs.* CITY OF CHICAGO. }

And the defendant, by John W. Green and Clarence A. Knight,

its attorneys, comes and defends the wrong and injury when, etc., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country.

JOHN W. GREEN AND
CLARENCE A. KNIGHT,
Att's for Def't.

And afterwards, to wit, on the 25th day of November and the 2nd day of December, A. D. 1889, the following, among other, proceedings were had and entered of record in said court, to wit:

11 WILLIAM HARMON *vs.* CITY OF CHICAGO. } 68967, 5088. Assumpsit.

On motion of said plaintiff, by his attorney, it is ordered by the court that the judgment entered herein on the 19th instant be, and the same is hereby, set aside and vacated and held altogether for naught, and that said cause be, and it is, reinstated upon the docket of this court, the same to stand upon the motion of said plaintiff to set aside the finding of the court aforesaid and for a new trial of said cause.

WILLIAM HARMAN *vs.* CITY OF CHICAGO. } 68967, 5088. Assumpsit.

This day came on for hearing the motion of said plaintiff to set aside the finding of the court aforesaid and for a new trial of said cause, and the court, being fully advised in the premises, overrules said motion; to which ruling by the court the said plaintiff, by his attorney, duly excepts.

Wherefore it is considered by the court that said defendant go hence hereof without day and recover of said plaintiff its costs in this behalf expended, to be taxed, and have execution therefor; to all of which the said plaintiff, by his attorney, duly excepts and prays an appeal to the appellate court of the first district of
12 Illinois, which is granted, on condition that said plaintiff doth within thirty days from this date execute and file herein an appeal bond in the penal sum of one thousand dollars, with security, to be approved by the court or by the clerk of this court.

And it is further ordered that said plaintiff have thirty days from date in which to prepare and file a bill of exceptions in said cause.

And afterwards, to wit, on the 6th day of Jan'y, A. D. 1890, there was filed in said cause a certain stipulation, which is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

WILLIAM HARMAN }
vs.
CITY OF CHICAGO. }

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above-entitled cause that the clerk of the said court, in preparing the transcript of the record in said cause for the appellate court, may incorporate into the said transcript of record the original bill of exceptions filed herein and make the same a part thereof.

13 SCHUYLER & KREMER,
Att'ys for Pl'ff.
Y. W. ROBINSON,
Attorney for Defendant.

Dated January 6th, 1890.

And thereupon, on the 30th day of December, A. D. 1889, there was filed in said cause a certain bill of exceptions, which is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

WILLIAM HARMAN }
vs.
CITY OF CHICAGO. }

Be it remembered that on the trial of the above-entitled cause before the Honorable Richard S. Tuthill, without a jury, a trial by jury being waived by stipulation, the plaintiff, to maintain the issues on his behalf, introduced the following stipulation of facts, viz:

It is hereby stipulated and agreed that, for the purpose of determining the right of the defendant to require of the plaintiff a license and impose and collect a fine or license fee therefor under
14 the ordinance of the said defendant hereinafter set forth, the following are the ultimate facts under which the said license was required and the fine or license fee imposed and collected, viz:

That on the 26th day of September, 1888, the said plaintiff was the owner and manager of the following steam-tugs, viz., Tom Brown, F. S. Butler, J. H. Hackley, C. W. Parker, Bob Teed, A. B. Ward, W. H. Wolf, Crawford, G. B. McClellan, Mary McLane, Success, and Wahbun; that said tugs and each of them were of twenty tons burden and upwards, and were on the said date and for a long time prior thereto had been enrolled and licensed for the coasting

trade in pursuance of and under the provisions of "Title L" of the Revised Statutes of the United States, to which reference is hereby made and which are made a part hereof; that prior to the date aforesaid and on the 5th day of March, 1883, the common council of the said city of Chicago, acting under the power supposed to be vested in it by chapter 24 of the Revised Statutes of the State of Illinois, and under which the said city was at said time incorporated, passed and enacted an ordinance regulating the navigation of steam-tugs and other vessels on the Chicago river and Lake Michigan and the waters tributary thereto, requiring that the owner thereof take out a license therefor and imposing upon him a fine or penalty for failing so to do, which said ordinance is in the words and figures following:

"Be it ordained by the city council of the city of Chicago

SEC. 1. No person or persons shall keep, use or let for hire any tug or steam-barge or tow-boat for towing vessels or craft in the Chicago river, its branches or slips connecting therewith, or
15 in and about the harbor of the city of Chicago, without first obtaining a license therefor in the manner and way hereinafter mentioned.

SEC. 2. All applications for such license shall be made to the mayor, and upon the payment of twenty-five dollars ($25) to the city collector, a license shall be issued for the period of one year by the city clerk for such tug or steam-barge or tow-boat, and it shall be the duty of the city clerk to keep a register of the name of the person to whom such license is granted or transferred, the day when issued or transferred, the number of the license, and the name and description of the tug so licensed.

SEC. 3. Every tug or steam-barge or tow-boat shall have *have* the number of the license and the name of the owner marked on both sides of such tug or steam-barge or tow-boat in plain legible figures and letters.

SEC. 4. Any individual or person violating any provision of this ordinance shall be subject to a fine of not less than five dollars ($5) nor more than fifty dollars ($50) for each offense.

SEC. 5. This ordinance shall be in force from and after its passage."

That said steam-tugs were enrolled and licensed in the manner and for the purpose aforesaid by the United States authorities in and at the northern district of Illinois, in which the said defendant, the said City of Chicago, is situated, and were on the 26th day of September, 1888, and for a long time prior thereto had been engaged in the coasting and foreign trade and in commerce and navi-
16 gation, namely, in towing vessels engaged in interstate commerce into and out of the Chicago river and harbor from and to said Lake Michigan, and in pursuance of the conduct of the said trade were navigating the said Chicago river and the waters of Lake Michigan and the tributaries thereto, which said river is from time to time deepened for navigation purposes by dredging under the direction and at the expense of said City of Chicago.

That on the said day the said city collector of the said City of

Chicago, the defendant herein, notified the said plaintiff to apply for and take out a license in pursuance of the requirements of the said ordinance for each of said steam-tugs, and to pay therefor the sum of twenty-five dollars for each of the said tugs or the sum of three hundred dollars in the aggregate; that the said plaintiff thereupon notified the said collector that the said steam-tugs and each of them were licensed for the coasting trade in pursuance of and in accordance with the requirements of the laws of the said United States and were engaged in said trade on the said Chicago river and said Lake Michigan and the waters tributary thereto in the manner as aforesaid, and thereupon claimed to the said collector that the said ordinance was invalid, and that the said city of Chicago had no power or authority to require the said plaintiff to take out a license in pursuance of the requirements of the said ordinance or to pay the said fee of twenty-five dollars for each of the said steam-tugs, and thereupon refused to take out the said license or to pay the said fee, whereupon the said collector of the said defendant caused the said plaintiff to be arrested upon a warrant issued for that purpose, and that while the said plaintiff was under
17 arrest he paid the said license fee under protest and took out the license as required by the said ordinance and as demanded of him by the said collector, which said license was thereupon issued to him.

That the amount of the fees so as aforesaid paid to the said collector for the said defendant was the sum of three hundred dollars; that the said sum was paid by the said collector into the treasury of the said defendant, the said City of Chicago, and that the questions which arise on the foregoing state of facts are as follows, viz:

1st. Whether or not the said defendant can require the plaintiff to take out the license and collect therefor the fees provided for in the ordinance aforesaid.

2d. Whether there was vested in the defendant the power to require of the plaintiff the license and fee provided for in the ordinance aforesaid and in the manner shown by the foregoing state of facts.

3d. Whether the said ordinance under which said license was required and the said fee was imposed and collected is legal and binding upon the plaintiff.

4th. Whether the plaintiff is not entitled to judgment for the amount of fees so paid by him as aforesaid.

It is hereby further stipulated that the said facts may be presented to the court and tried under the pleadings as they now stand, and that an order may be entered in said suit submitting the same to the Honorable Richard S. Tuthill for trial without the intervention of a jury, and that either party shall have the right to appeal from the decision and final judgment of the court herein
18 in the same manner and to the same extent as they would have if the same case had been tried in the usual and ordinary way.

Dated June 27th, 1889.

SCHUYLER & KREMER,
Attorneys for Plaintiff.
JONAS HUTCHINSON,
Attorney for Defendant.

And thereupon further introduced in evidence an ordinance of the city council of the city of Chicago in the words and figures following, viz:

CHAPTER 1.

"SEC. 1. The inhabitants of all that district of country in the county of Cook and State of Illinois, contained within the limits and boundaries hereinafter prescribed, shall be a body politic under the name and style of the city of Chicago; and by that name sue and be sued, complain and defend, in any court; make and use a common seal, and alter it at pleasure; and take and hold, purchase, lease and convey such real and personal or mixed estate as the purposes of the corporation may require, within or without the limits aforesaid.

SEC. 2. The corporate limits and jurisdiction of the city of Chicago shall embrace and include, within the same, all of township thirty-nine north, range fourteen east of the third principal meridian, and all of sections thirty-one, thirty-two, thirty-three, and fractional section thirty-four, in township forty, north range fourteen, east of the third principal meridian, together with so much of the
19 waters and bed of Lake Michigan as lies within one mile of the shore thereof and east of the territory aforesaid.

SEC. 3. All that portion of the aforesaid territory lying north of the center of the main Chicago river and east of the center of the North branch of said river, shall constitute the north division of said city; all that portion of the aforesaid territory lying south of the center of the main Chicago river and south and east of the center of the South branch of said river of the Illinois and Michigan canal, shall constitute the south division of said city; and all that portion of the aforesaid territory lying west of the center of the North and South branches of said river and of the Illinois and Michigan canal, shall constitute the west division of said city."

Which was all the evidence offered by either of the parties to said suit on the trial thereof, and which are the ultimate facts in the case. Whereupon the plaintiff submitted to the court the following written propositions to be held as the law in the decision of the case, viz:

"The court is hereby requested, on behalf of the plaintiff in the above-entitled cause, to hold in the decision of the said cause the following propositions as the law of the case:

1st. That at the date of the arrest of the plaintiff for a failure to comply with the requirements of the ordinance of the defendant, set out in the evidence in said cause, and take out a license in pursuance of the terms and provisions thereof, and pay the license fee therefor, and for a long time prior thereto the said tugs of the plaintiff were enrolled and licensed for the coasting trade at
20 the custom-house of the port of Chicago and in compliance with the laws of the United States, and were thereupon engaged in commerce and navigation between ports and places of different States of the United Sates on the Great Lakes and the port

of the said defendant, and while so engaged were navigating the said lakes and the said Chicago river; that the said ordinance of the said defendant is therefore a direct interference with commerce and navigation, and hence in conflict with the Federal Constitution and the laws of the United States and void, and the license fee imposed and collected thereunder unlawful.

2nd. That the plaintiff, as shown by the evidence, was compelled to take out a license and pay a fee therefor for the privilege of running and operating his steam-tugs in the Chicago river, in pursuance of the requirements of the ordinance of the defendant, read in evidence in the above-entitled cause, and that at the time of the taking out of the said license and for a long time prior thereto the said tugs of the said plaintiff had been and were enrolled and licensed for the coasting trade, in pursuance of the laws of the United States, and at the custom-house of the United States for the district and port of Chicago, and were then and there engaged in commerce and navigation between ports and places in different States of the United States on the Great Lakes and the waters tributary thereto and the port of Chicago, and whilst so engaged were used in the plaintiff's business and were navigating the said lakes and the said Chicago river; that the said license fee paid by the said plaintiff in pursuance of the terms of the said ordinance was a charge upon his privilege of navigating the said Chicago river and the said lakes and of running and operating the said tugs thereon, and
21 was in conflict with the Constitution and laws of the United States in that regard and hence null and void and the said license fee unlawfully imposed and collected.

3rd. That the said license fee so imposed upon and collected from the said plaintiff, under the ordinance of the said defendant, read in evidence in the above-entitled suit, was a direct charge made upon the plaintiff as the price of the privilege of navigating the said Chicago river and the waters of Lake Michigan adjacent thereto and embraced within the jurisdiction of the said city; that at the date when the said license fee was imposed and collected, in the manner shown by the evidence herein, the tugs of the said plaintiff were enrolled and licensed for the coasting trade in pursuance of the requirements of the laws of the United States and at the custom-house of the United States, in the district in which the port of Chicago is situated, and were thereupon engaged in interstate commerce and navigation between the ports and places in different States of the United States and on the said Chicago river and on the Great Lakes, so called, and the waters tributary thereto, and, while so engaged, were navigating the said lakes and the said Chicago river; that the said license fee so charged in the manner aforesaid was, therefore, an interference with interstate commerce and in direct conflict with the Constitution and laws of the United States and hence null and void, and the said fee so enforced was, therefore, unlawfully assessed and collected.

4th. That the said license fee imposed upon the plaintiff in pursuance of the terms of the ordinance contained in the agreed
22 statement of facts herein and in the manner stated is a direct

charge made upon the plaintiff as the price of the privilege of navigating the Chicago river and the waters of Lake Michigan adjacent thereto and within the jurisdiction of the city of Chicago, and is therefore in direct conflict with the Constitution and laws of the United States, and hence was unlawfully assessed and collected.

5th. That the said license fee assessed and collected from the plaintiff in the manner shown in the agreed case herein and in pursuance of the ordinance of the city of Chicago, as contained in the agreed case, was a charge made by the said city of Chicago under the said ordinance as the price of the privilege of the said plaintiff's navigating the said Chicago river and the waters of Lake Michigan adjacent thereto, and that the said ordinance was an open violation of and in conflict with the Constitution and laws of the United States and an attempt by the city council of the said city of Chicago to regulate commerce upon the Chicago river and said Lake Michigan within the jurisdiction of the said city, and was therefore null and void for that purpose, and the said license fee was unlawfully assessed and collected from the said plaintiff."

But the court thereupon refused to hold the said propositions as the law of the case, and, in pursuance of the requirements of the statute in such case made and provided, marked the same "refused;" to which ruling and opinion of the court in refusing to hold said propositions as the law of the case in the decision thereof the plaintiff, by his counsel, then and there excepted, and thereupon entered a motion for a new trial in the words and figures following, viz:

23 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

WILLIAM HARMAN }
vs.
CITY OF CHICAGO. }

And now comes the said plaintiff, by Schuyler & Kremer, his attorneys, and moves the court for a new trial in the above-entitled cause, and as a reason therefor shows into the court the following:

1st. That the finding and ruling of the court is against the evidence.

2nd. That the finding and ruling of the court is contrary to the law and the evidence.

3rd. That the court erred in refusing to hold the written propositions submitted on behalf of the plaintiff as the law in the decision of the case.

4th. That the court erred in marking the said written propositions of law "refused" and not holding the same as the law of the case, as requested on behalf of the plaintiff.

5th. That the court erred in overruling the plaintiff's motion for a new trial and in entering judgment in favor of the defendant.

That the said motion for a new trial so entered as aforesaid was subsequently overruled by the court and judgment entered in favor of the defendant; to which ruling and opinion of the court in
24 overruling the said motion for a new trial and in entering judgment in said cause for the said defendant the said plaintiff, by his counsel, then and there excepted.

And forasmuch as the foregoing matters and things do not appear of record the plaintiff hereby tenders the foregoing as his bill of exceptions in said cause and requests that the same may be signed and sealed in pursuance of the requirements of the statute in such case made and provided, and the same is done accordingly.

RICHARD S. TUTHILL. [SEAL.]

O. K.
M. W. ROBINSON.

(Endorsed on back:)
68967. Circuit court, Cook county. Wm. Harmon *vs.* City of Chicago. Bill of exceptions. Filed Dec'r 30th, 1889. Henry Best, clerk.

25 And afterwards, to wit, on the 14th day of February, A. D. 1890, the following, among other, proceedings were had and entered of record in said court, to wit:

Order, Feb. 14, '90.

WILLIAM HARMON *vs.* CITY OF CHICAGO. } 68967, 5088. Assumpsit.

On motion of said plaintiff leave is given to amend the record in said cause of the 2nd day of December last making the penalty in the appeal bond five hundred dollars instead of one thousand dollars.

And on the 30th day of December, A. D. 1889, there was filed in said cause a certain appeal bond, which is in the words and figures following, to wit:

Know all men by these presents that we, William Harman and James L. Higgie and James S. Dunham, of the county of Cook and State of Illinois, are held and firmly bound unto City of Chicago, also of the same county and State, in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally and firmly by these presents.

Witness our hands and seals this 16th day of December, A. D. 1889.

26 The condition of the above obligation is such that whereas the said city of Chicago did, on the 2nd day of December,

A. D. 1889, in the circuit court of Cook county, in the State aforesaid, and of the November term thereof, A. D. 1889, recover a judgment against the above-bounden William Harman for the costs of suit, from which said judgment of the said circuit court of Cook county the said William Harman has prayed for and obtained an appeal to the appellate court in and for the first district of said State:

Now, therefore, if the said William Harman shall duly prosecute his said appeal with effect and, moreover, pay the amount of the judgment, interest, damages, and costs rendered and to be rendered against him in case the said judgment shall be affirmed, the above obligation to be then void; otherwise to remain in full force and virtue.

WILLIAM HARMAN. [SEAL.]
JAMES L. HIGGIE. [SEAL.]
J. S. DUNHAM. [SEAL.]

Approved:
R. S. TUTHILL, *Judge.*

27 STATE OF ILLINOIS, } ss:
Cook County, }

I, Henry Best, clerk of the circuit court of Cook county and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court, on the common-law side thereof, between William Harmon, plaintiff, and City of Chicago, defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 5th day of February, 1890.

Court Seal.

HENRY BEST, *Clerk.*

In the Appellate Court of Illinois, First District, March Term, A. D. 1890.

WILLIAM HARMON *vs.* CITY OF CHICAGO. } Appeal from Circuit Court of Cook County.

Assignment of Errors.

1st. The court below erred in refusing to hold as the law of the case the propositions requested on behalf of the plaintiff.

2d. The court below erred in finding the issues for the defendant.

28 3d. The court below erred in overruling the plaintiff's motion for a new trial.

4th. The finding of the court below is contrary to the weight of evidence.

5th. The finding of the court below is against the law and the evidence.

6th. The court below erred in entering judgment for the defendant.

SCHUYLER & KREMER,
Attorneys for Appellant.

In the Appellate Court, First District Illinois.

WILLIAM HARMON
vs.
CITY OF CHICAGO. } No. 3622. App'l Cook Circuit.

I, John J. Healy, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached and marked A is the original transcript of record filed in said appellate court on the 5 day of March, A. D. 1890, by said appellant.

In testimony whereof I have hereunto set my hand and seal of said court, at Chicago, this 26 day of July, A. D. 1890.

Court Seal.

JNO. J. HEALY,
Clerk of the Appellate Court, First District Illinois.

(Endorsed:) No. 50. Filed Sept. 12, 1890. A. H. Taylor, clerk.

29 And afterwards, to wit, on the same day, there was filed in said clerk's office a transcript of the record and proceedings of the appellate court of Illinois, first district, in words and figures following, to wit:

At a term of the appellate court begun and held at Chicago on Tuesday, the fourth day of March, in the year of our Lord one thousand eight hundred and ninety, within and for the first district of the State of Illinois.

Present: Hon. Jos. E. Gary, presiding justice.
" " Thos. A. Moran, justice.
" " Gwynn Garnett, justice.
John J. Healy, clerk.
C. R. Matson, sheriff.

WILLIAM HARMON
vs.
CITY OF CHICAGO. } No. 3622. Appeal Cook Circuit.

Be it remembered that on the 22nd day of April, A. D. 1890, it being one of the days of said March term, A. D. 1890, certain proceedings were had in said court and entered of record in words and figures following, to wit:

WILLIAM HARMON
vs.
CITY OF CHICAGO. } 3622. Appeal Cook Circuit.

30 This cause having this day been reached in the call of the docket was argued by counsel for the respective parties, and

the court, not being fully advised in the premises, doth order that said cause be taken under advisement.

And be it further remembered that afterwards, to wit, on the 30th day of June, A. D. 1890, a judgment was rendered in said cause in said appellate court and entered of record in the words and figures following, to wit:

WILLIAM HARMON, Appellant, *vs.* CITY OF CHICAGO, Appellee. } No. 3622. Appeal Cook Circuit Court.

On this day come again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in
31 full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said City of Chicago, appellee, recover of and from the said William Harmon, appellant, costs by it in this behalf expended, and that it have execution therefor.

And afterwards, to wit, on the 5th day of July, A. D. 1890, the following order was made and entered of record in said cause:

WILLIAM HARMON *vs.* CITY OF CHICAGO. } 3622. Appeal Cook Circuit.

The court having considered the petition of appellant, praying for an appeal from the order and judgment of this court in said cause to the supreme court of the State of Illinois, and the court, being fully advised in the premises, are of the opinion and therefore certify that this cause involves questions of law of such importance on account of collateral interests involved as that it should be passed upon by the supreme court, it is therefore ordered that an appeal be allowed herein to the northern grand division of said supreme court on condition that appellant doth within twenty days from this date execute and file in said cause a good and sufficient appeal bond in the penal sum of two hundred and fifty dollars, with surety thereto to be approved by the court.

And afterwards, on the 16th day of July, A. D. 1890, the
32 following order was made and entered of record in said cause, to wit:

WILLIAM HARMON
vs.
CITY OF CHICAGO. } 3622. Appeal Cook Circuit.

This day came appellant, by his counsel, and presented his certain appeal bond in said cause in the penal sum of two hundred and fifty dollars, with James F. Dunham as surety thereto, and the court, being fully satisfied as to the qualifications of said surety, doth order that said appeal bond be, and the same is hereby, taken, approved, and filed herein.

And on the same day, to wit, July 16th, A. D. 1890, the following appeal bond was filed in said cause:

Know all men by these presents that we, William Harmon and James S. Dunham, of the county of Cook and State of Illinois, are held and firmly bound unto the City of Chicago, also of the same county and State, in the penal sum of two hundred and fifty dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 7th day of July, A. D. 1890.

The condition of the above obligation is such that whereas
33 the said City of Chicago did, on the 30th day of June, A. D. 1890, in the appellate court in and for the first district of the said State aforesaid, and of the —— term thereof, A. D. 1890, recover a judgment against the above-bounden William Harmon for costs of suit, from which said judgment of the said appellate court in and for the said first district the said William Harmon has prayed for and obtained an appeal to the supreme court of said State:

Now, therefore, if the said William Harmon shall duly prosecute his said appeal with effect and, moreover, pay the amount of the judgment, interest, damages, and costs rendered and to be rendered against him in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void; otherwise to remain in full force and virtue.

WILLIAM HARMON. [SEAL.]
JAMES S. DUNHAM. [SEAL.]

O K.
M. W. ROBINSON,
Att'y for City of Chicago.

I, John J. Healy, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the record and proceedings of the said appellate court in the above-entitled cause of record in my office.

34 In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 21st
[COURT SEAL.] day of July, in the year of our Lord one thousand eight hundred and ninety.

JNO. J. HEALY,
Clerk of the Appellate Court of the First District.

In the Supreme Court of Illinois, Northern Grand Division, October Term, A. D. 1890.

WILLIAM HARMON, Appellant,
vs.
CITY OF CHICAGO, Appellee.
} Appeal from Appellate Court, First District.

Assignment of Errors.

1st. The appellate court erred in affirming the judgment of the circuit court.

2d. The appellate court erred in not reversing the judgment of the circuit court and in not remanding the said cause to the circuit court for another hearing.

3d. The judgment of the appellate court is contrary to law.

4th. The ordinance of the city of Chicago contained in the record for licensing and regulating-steam tugboats navigating
35 the Chicago river and harbor of Chicago is in conflict with the Constitution and laws of the United States.

5th. The ordinance of the city of Chicago contained in the record for licensing and regulating steam-tugboats navigating the Chicago river and harbors of Chicago is not authorized by the laws of the State of Illinois.

SCHUYLER & KREMER,
Att'ys for Appellant.

(Endorsed:) No. 50. Filed Sept. 12, 1890. A. H. Taylor, clerk.

36 Be it remembered that, to wit, on the 12th day of September, A. D. 1890, there issued out of the said court a certain writ of error in the words and figures following, viz:

STATE OF ILLINOIS, *ss:*

Supreme Court, Northern Grand Division.

The people of the State of Illinois to the clerk of the circuit court of Cook county, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which was in the circuit court of Cook county, before the judge thereof, between William Harman and City of Chicago, it is said manifest error hath intervened, to the injury of the aforesaid William Harman, as we are informed by his complaint, *and* we, being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that, if judgment thereof be given, you distinctly and openly, without delay, send to our justices of the supreme court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our justices aforesaid, at Ottawa, in the county of La Salle, on the first Tuesday of October next, that, the record and proceedings being inspected, we may cause to be done therein

to correct the error what of right ought to be done according to law.

Witness the Hon. John Scholfield, chief justice of our
37 court, and the seal thereof, at Ottawa, this 12th day of September, in the year of our Lord one thousand eight hundred and ninety.

[COURT SEAL.]

A. H. TAYLOR,
Clerk of the Supreme Court.

And be it remembered that afterwards, to wit, on the 8th day of October, A. D. 1890, certain proceedings were had and orders made by said court and entered of record, among which is the following, viz:

WILLIAM HARMON
vs.
CITY OF CHICAGO. } 51. Error to Cook.

And now, on this day, comes the said appellant, by Schuyler & Kremer, attorneys, and moves the court to consolidate this cause with No. 50 of this docket, and that the two cases be heard as one, which motion is by the court granted.

And afterwards, to wit, on the 11th day of October, A. D. 1890, certain proceedings were had and orders made by said court and entered of record, among which is the following, viz:

WILLIAM HARMON
vs.
CITY OF CHICAGO. } 50. Appeal from 1st District.

38 Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that plaintiff in error hath filed herein a duly certified copy of the transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said plaintiff in error having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

WILLIAM HARMON
vs.
CITY OF CHICAGO. } 51. Error to 1st District.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this

court, and it appearing to the court that plaintiff in error hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein,
and entered motion to reverse the judgment and remand said
39 *cuase* and for costs, and the said defendant in error having
entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

Be it remembered, to wit, on the 22nd day of January, A. D. 1891, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

WILLIAM HARMON *vs.* CITY OF CHICAGO. } 2348, 50. Appeal from Appellate Court, First District.

and

WILLIAM HARMON *vs.* CITY OF CHICAGO. } 2349, 51. Error to Cook.

And now, on this day, this cause having been argued by counsel, and the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid there is manifest error:

40 Therefore it is considered by the court that for that error and others in the record and proceedings aforesaid the judgment of the appellate & circuit courts in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the circuit court of Cook county with directions to enter judgment for the plaintiff.

And it is further considered by the court that the said appellant recover of and from the said appellee his costs by him in this behalf expended, and that the same be paid in due course of law.

At a supreme court begun and held at Ottawa on Tuesday, the third day of March, in the year of our Lord one thousand eight hundred and ninety-one, within and for the northern grand division of the State of Illinois.

Present: John Scholfield, chief justice; Alfred M. Craig, justice; Simeon P. Shope, justice; Benj. D. Magruder, justice; Joseph M. Bailey, justice; David J. Baker, justice; Jacob W. Wilkin, justice;

George Hunt, attorney general; William W. Taylor, sheriff, Alfred H. Taylor, clerk.

Be it remembered, to wit, on the 9th day of March, A. D. 1891, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

41 *Petition for Rehearing.*

WILLIAM HARMON *vs.* CITY OF CHICAGO. } 2348, 50. Appeal from Appellate Court, First District.

Now, on this day, this cause coming on to be heard upon the petition of the appellee for a rehearing herein, and the court being now duly advised in the premises, it is considered and ordered by the court that said petition for a rehearing be allowed.

At a supreme court begun and held at Ottawa on Tuesday, the sixth day of October, in the year of our Lord one thousand eight hundred and ninety-one, within and for the northern grand division of the State of Illinois.

Present: Benj. D. Magruder, chief justice; John Scholfield, justice; Alfred M. Craig, justice; Simeon P. Shope, justice; Joseph M. Bailey, justice; David J. Baker, justice; Jacob W. Wilkin, justice; George Hunt, attorney general; William W. Taylor, sheriff; Alfred H. Taylor, clerk.

Be it remembered, to wit, on the 27th day of October, A. D. 1891, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

42 WILLIAM HARMON *vs.* CITY OF CHICAGO. } 29, R. H. Appeal from First District.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, a rehearing having been ordered herein, and it appearing to the court that appellant hath entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

Be it remembered, to wit, on the 18th day of January, A. D. 1892, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

WILLIAM HARMON *vs.* CITY OF CHICAGO. } 2348, 50. Appeal from Appellate Court, First District.

and

43 WILLIAM HARMON *vs.* CITY OF CHICAGO. } 2349, 51. Error to Cook.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgments aforesaid is there anything erroneous, vicious, or defective, and that that record is no error, therefore it is considered by the court that the judgments aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellee recover of and from the said appellant its costs by it in this behalf expended, and that it have execution therefor.

44 Be it remembered that afterwards, to wit, on the 18th day of January, 1892, the same being the day and year last aforesaid, the opinion of the court was filed in the clerk's office of said court in words and figures following, to wit:

WILLIAM HARMON *vs.* CITY OF CHICAGO. } No. 29, R. H. Error to Cook and Appeal from First District.

45 No. 29, R. H.

This was an action of assumpsit brought by William Harmon against the city of Chicago to recover back the sum of $300 paid by the plaintiff on compulsion and under protest for the tug-boat licenses. The declaration consisted merely of the common *indebitatus assumpsit* counts, to which the defendant pleaded *non-assumpsit*, and the trial was had before the court, a jury being waived, on the following stipulation as to the facts:

"It is hereby stipulated and agreed that for the purpose of determining the right of the defendant to require of the plaintiff a license and impose and collect a fine or license fee therefor under the ordinance of the said defendant hereinafter set forth the following are the ultimate facts under which the said license was required and the fine or license fee imposed and collected, viz:

That on the 26th day of September, 1888, the said plaintiff was the owner and manager of the following steam-tugs, viz: Tom Brown, F. S. Butler, J. H. Hackley, C. W. Parker, Bob Teed, A. B. Ward, W. H. Wolfe, Crawford, C. B. McClellan, Mary McLane, Success, and Wahbun; that said tugs and each of them were of twenty tons

burden and upwards, and were on the said date and for a long time prior thereto had been enrolled and licensed for the coasting trade in pursuance of and under the provisions of 'title L' of the Revised Statutes of the United States, to which reference is hereby made and which are made a part hereof; that prior to the date aforesaid and on the 5th day of March, 1883, the common counsel of the said city of Chicago, acting under the power supposed to be vested in it by chapter 24 of the Revised Statute- of the State
46 of Illinois and under which the said city was at said time incorporated, passed and enacted an ordinance regulating the navigation of steam-tugs and other vessels on the Chicago river and Lake Michigan and the waters tributary thereto, requiring that the owner thereof take out a license therefor and imposing upon him a fine or penalty for failing so to do; which said ordinance is in the words and figures following:

Be it ordained by the city council of the city of Chicago:

SEC. 1. No person or persons shall keep, use or let for hire any tug or steam-barge or tow-boat for towing vessels or craft in the Chicago river, its branches or slips connecting therewith, or in and about the harbor of the city of Chicago, without first obtaining a license therefor in the manner and way hereinafter mentioned.

SEC. 2. All applications for such license shall be made to the mayor, and upon the payment of twenty-five dollars ($25) to the city collector, a license shall be issued for the period of one year by the city clerk for such tug or steam-barge or tow-boat, and it shall be the duty of the city clerk to keep a register of the name of the person to whom such license is granted or transferred, the day when issued or transferred, the number of the license, and the name and description of the tug so licensed.

SEC. 3. Every tug or steam-barge or tow-boat shall have the number of the license and the name of the owner marked on both sides of such tug or steam-barge or tow-boat in plain legible figures and letters.

SEC. 4. Any individual or person violating any provision of this ordinance shall be subject to a fine of not less than five dollars ($5) nor more than fifty dollars ($50) for each offence.

47 SEC. 5. This ordinance shall be in force from and after its passage.

That said steam-tugs were enrolled and licensed in the manner and for the purpose aforesaid by the United States authorities in and at the northern district of Illinois, in which the said defendant, the said City of Chicago, is situated, and were on the 26th day of September, 1888, and for a long time prior thereto had been engaged in the coasting and foreign trade and in commerce and navigation, namely, in towing vessels engaged in interstate commerce into and out of the Chicago river and harbor from and to said Lake Michigan, and in pursuance of the conduct of the said trade were navigating the said Chicago river and the waters of Lake Michigan and the tributaries thereto, which said river is from time to time deepened for navigation purposes by dredging under the direction and at the expense of said city of Chicago.

That on the said day the said city collector of the said City of Chicago, the defendant herein, notified the said plaintiff to apply for and take out a license, in pursuance of the requirements of the said ordinance, for each of said steam-tugs and to pay therefor the sum of twenty-five dollars for each of the said tugs or the sum of three hundred dollars in the aggregate; that the said plaintiff thereupon notified the said collector that the said steam-tugs and each of them were licensed for the coasting trade, in pursuance of and in accordance with the requirements of the laws of the United States, and were engaged in said trade on the said Chicago river and said Lake Michigan and the waters tributary thereto in the manner as aforesaid, and thereupon claimed to the said collector that
48 the said ordinance was invalid and that the said city of Chicago had no power or authority to require the said plaintiff to take out a license in pursuance of the requirements of the said ordinance or to pay the said fee of twenty-five dollars for each of the said steam-tugs, and thereupon refused to take out the said license or to pay the said fee; whereupon the said collector of the said defendant caused the said plaintiff to be arrested upon a warrant issued for that purpose, and that while the said plaintiff was under arrest he paid the said license fee under protest and took out the license as required by the said ordinance and as demanded of him by the said collector; which said license was thereupon issued to him.

That the amount of the fees so as aforesaid paid to the said collector for the said defendant was the sum of three hundred dollars; that the said sum was paid by the said collector into the treasury of the said defendant, the said City of Chicago, and that the questions which arise on the foregoing state of facts are as follows, viz:

1st. Whether or not the said defendant can require the plaintiff to take out the license and collect therefor the fees provided for in the ordinance aforesaid.

2d. Whether there was vested in the defendant the power to require of the plaintiff the license and fee provided for in the ordinance aforesaid and in the manner shown by the foregoing state of facts.

3d. Whether the said ordinance under which said license was required and the said fee was imposed and collected is legal and binding upon the plaintiff.

4th. Whether the plaintiff is not entitled to judgment for
49 the amount of fees so paid by him as aforesaid.

It is hereby further stipulated that the said facts may be presented to the court and tried under the pleadings as they now stand, and that an order may be entered in said suit submitting the same to the Honorable Richard S. Tuthill for trial without the intervention of a jury, and that either party shall have the right to appeal from the decision and final judgment of the court herein, in the same manner and to the same extent as they would have if the said case had been tried in the usual and ordinary way.

The counsel for the plaintiff also offered in evidence the following sections of an ordinance of the city of Chicago, to wit:

"SEC. 1. The inhabitants of all that district of country in the county of Cook and State of Illinois contained within the limits and boundaries hereinafter prescribed, shall be a body politic under the name and style of the city of Chicago; and by that name sue and be sued, complain and defend in any court; make and use a common seal, and alter it at pleasure: and take and hold, purchase, lease and convey such real and personal or mixed estate as the purposes of the corporation may require, within or without the limits aforesaid.

SEC. 2. The corporate limits and jurisdiction of the city of Chicago shall embrace and include within the same, all of township thirty-nine north, range fourteen, east of the third principal meridian, and all of section- thirty-one, thirty-two, thirty-three, and fractional section thirty-four, in township forty, north range fourteen, east of the third principal meridian, together with so much of the waters and bed of Lake Michigan as lies within one mile of the shore thereof and east of the territory aforesaid.

50 SEC. 3. All that portion of the aforesaid territory lying north of the center of the main Chicago river and east of the center of the north branch of said river, shall constitute the north division of said city; all that portion of the aforesaid territory lying south of the center of the main Chicago river and south and east of the center of the south branch of said river of the Illinois and Michigan canal, shall constitute the south division of said city; and all that portion of the aforesaid territory lying west of the center of the north and south branches of said river and of the Illinois and Michigan canal, shall constitute the west division of said city."

The foregoing being all the evidence given at said trial, the plaintiff submitted five propositions to be held as the law in the decision of the ca-e, asserting in substance the invalidity of the ordinance requiring the payment of a license fee by the owners of tug-boats used on the Chicago river, and also asserting that said city had no power to exact such license fee, but the court refused to hold said propositions as the law and gave judgment on the evidence in favor of the defendant.

That judgment has been affirmed by the appellate court, and the plaintiff now brings the record to this court by a further appeal, the judges of the appellate court having granted him the necessary certificate of importance.

51 *Opinion by Bailey, J.*

The statement preceding this opinion contains the entire evidence as it appears in the bill of exceptions, but the facts, more briefly, are these: On the 26th day of September, 1888, the plaintiff was the owner and manager of twelve steam-tugs, each of twenty tons burden or over, all of which were enrolled and licensed for the coasting trade by the United States authorities in the northern district of Illinois, in pursuance of the provisions of the Federal statutes, and were engaged in the coasting and foreign trade and in commerce and navigation—that is to say, in towing vessels engaged in inter-

state and foreign commerce into and out of the Chicago river and harbor from and to Lake Michigan, and in pursuance of said trade were navigating said Chicago river, the waters of Lake Michigan, and the tributories thereto.

The Chicago river and harbor are both within the territorial limits and jurisdiction of the city of Chicago, and said river is from time to time deepened for purposes of navigation by dredging under the direction and at the expense of said city.

At the date above mentioned there was in force an ordinance of the common council of said city providing that no person should keep, use, or let for hire any tug, steam-barge, or tow-boat for towing vessels or craft in the Chicago river, its branches, or the slips connecting therewith, or in or about the harbor of the city of Chicago without first obtaining a license therefor, and providing further that such licenses should issue on payment to the city collector of $25 for each tug, steam-barge, or tow-boat, and that any person violating any of the provisions of said ordinance should be subject to a fine of not less than $5 nor more than $50.

52 On said 26th day of September, 1888, said city collector notified the plaintiff to take out licenses in pursuance of the requirements of said ordinance for each of his said steam-tugs and to pay the sum of $25 for each of said tugs, being $300 in the aggregate, and the plaintiff thereupon, claiming that as his tugs were licensed for the coasting trade in accordance with the laws of the United States and were engaged in such trade said ordinance was invalid and said city had no power to require him to take out said license, refused to take the same out or pay the sum charged therefor.

Said collector then caused the plaintiff to be arrested upon a warrant issued for that purpose, and while under arrest the plaintiff paid for and took out said license, the amount so paid being $300, which money was by said collector paid into the treasury of said city.

The only controversy here is as to the validity of said ordinance and the power of the city to require the plaintiff to take out said license and pay the license fee, in view of the fact that his tugs had been enrolled and licensed by the proper authorities of the United States, under the provisions of the Federal statutes, for the coasting trade and were engaged in that trade on the Chicago river and the waters of Lake Michigan.

The power of the city council to pass said ordinance is to be found in the thirty-fourth clause of section 1, article 5, of the general act in relation to the incorporation of cities and villages where authority is given to city councils in cities "to license, regulate, and prohibit wharf-boats, tugs, and other boats used about the harbor

53 or within such jurisdiction"—that is, within the jurisdiction of the city. As bearing on the same subject reference may also be made to the thirty-eight clause of said section which gives authority "to make regulations in regard to the use of harbors, towing of vessels, opening and passing of bridges." It cannot be doubted that by these provisions the General Assembly, so far as it

could constitutionally do so, had vested in the city council of the city of Chicago the power to pass an ordinance of the character of the one in question.

But it is claimed that said ordinance, so far as it applies to tugs and other boats licensed by the United States for the coasting trade or engaged in that trade, amounts to a regulation of interstate commerce and is violative of that clause of section 8, article 1, of the Constitution of the United States which provides that "Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes." If said ordinance is in any proper sense a regulation of interstate commerce, it must be admitted that, so far as it *it* so, it is repugnant to this constitutional provision and void.

Since Congress has exercised its power in that behalf its authority is exclusive and all attempted regulations of interstate commerce by State authority are necessarily invalid.

When the case was first presented to this court the counsel for the city sought to sustain the validity of said ordinance upon the sole ground that its enforcement was merely an exercise of the police power, a power which has not been surrendered to the General Government, but is reserved to the States.

54 In considering that proposition we reached the conclusion that it was untenable, and as no other ground was suggested upon which the ordinance could be upheld we held it to be invalid and rendered judgment accordingly. In their petition for a rehearing, counsel have raised an entirely new proposition, viz., that as the Chicago river is kept in repair and made fit for navigation by being from time to time dredged and deepened under the direction and at the expense of the city, the money charged the owners of tugs and other similar vessels as a license fee may and should be regarded as only a proper compensation and equivalent for the use of the river in its improved condition, and is therefore in no proper sense a tax upon the commerce in which such vessels are engaged.

Where new propositions are raised for the first time on petition for a rehearing this court may and usually does refuse to consider them, and if our decision in this case had been one which would extend in its results no further than merely to determine whether the city should repay to the plaintiff the $300 sued for we should have been disposed to adopt that course here.

Counsel should not present their cases to this court by piecemeal, but should be prepared when the case is heard to urge every consideration upon which they expect to rely, but as our decision involves not merely the title of the city to the small sum of money sued for, but also determines as a collateral result the right of the city to collect license fees from all tugs and like vessels navigating the Chicago river which are licensed by the General Government for the coasting trade, we have thought proper, in the exercise

55 of our discretion, to depart from the ordinary rule and allow the case to be again heard upon all the propositions which

counsel, after more mature investigation, should see proper to urge.

We are of the opinion that the ordinance in question cannot be sustained on the ground that it is an exercise of the police power. This question is one as to which the decisions of the Supreme Court of the United States are of paramount authority, and nothing remains for us to do but to apply the principles laid down by that high tribunal.

The plaintiff's tugs, having been licensed by the United States for the coasting trade and being engaged in towing vessels in interstate commerce into and out of the Chicago river, must themselves be deemed in law to have been engaged in interstate commerce, although their operations were in fact confined largely to the corporate limits of the city of Chicago. This seems to be settled in principle by case of Foster *v.* Commissioners of Pilotage of Mobile, 22 How., 244.

In that case it appeared that the port of Mobile was resorted to by vessels and ships of different sizes engaged in trade and commerce with foreign nations and between different States, and that the larger of these were compelled by the shallowness of the water to anchor in the lower bay, and that the steamboat in question in that case was employed in lightering goods to and from such larger vessels, and in towing such vessels to and from the lower bay and wharves of the city, and in some instances beyond the outer bar and into the Gulf to the distance of several miles. Said steamboat had been enrolled and licensed to carry on the coasting trade, and was
56 seized under a State law requiring the owners of all steamboats navigating the waters of the State to have the same registered with the probate judge and imposing a penalty of $500 for a failure so to do.

It was held that said steamboat was engaged in the same commerce in which vessels which it was employed to assist were engaged, and was subject to the same rules. In the opinion the court says: "It is quite apparent, from the facts admitted in the case, that this steamboat was employed in aid of vessels in the foreign and coastwise trade and commerce of the United States, either in the delivery of their cargoes or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but a prolongation of the voyage of the vessels assisted to their port of destination."

One of the leading cases to which we are referred by counsel for the plaintiff as bearing upon the question of the validity of the ordinance under consideration, and especially of its validity as an exercise of the police power, is that of Sinnot *v.* Commissioners of Pilotage of Mobile, 22 How., 227.

That was a case arising under the same State statute in question on the Foster case above cited, the only difference between the two cases being that in that case the vessel seized was a steamboat employed in lightering and towing vessels arriving at the port of

Mobile, while the vessel seized in the Sinnot case was one actually engaged in navigation and commerce between the ports of different States. The facts in the Sinnot case, more fully stated, are
57 these: In 1854 the legislature of Alabama passed an act requiring each owner of a steamboat navigating the waters of that State, before such boat should leave the port of Mobile, to sign, swear to, and file with the probate judge, to be by him recorded, a written statement setting forth the name of the boat, the name, residence, and interest of the owner, and a new statement of like facts in case of the sale of the boat.

The act provided also that if any such owner should navigate any of the waters of the State with such boat without filing the statement thus required he should forfeit $500, to be recovered by the commissioners of pilotage of the bay of Mobile, either by suit against the owner or by attachment against the boat. A steamboat engaged in navigation and commerce between New Orleans, Louisiana, and Wetumpka and Montgomery, Alabama, which touched only at Mobile in her trade between said ports, and which had been enrolled and licensed under the act of Congress of February 18, 1795, in relation to the enrollment and license of vessels engaged on the coasting trade, was seized and detained under said act of the legislature of Alabama, and judgment was rendered against her for the penalty of $500. This judgment was affirmed by the supreme court of said State, but said judgment of affirmance, being taken by writ of error to the Supreme Court of the United States, was there reversed.

The latter court held, upon the foregoing facts, that vessels licensed under the act of Congress of 1795 had full authority to carry on the coasting trade; that said act specified certain conditions, upon the compliance with which license would be granted to the owners of vessels; that the Alabama act imposed other and
58 additional conditions to the privilege of carrying on the trade; that there was thus a direct conflict between the act of the State and the act of Congress regulating the trade; that Congress had legislated upon the very subject which the State had undertaken to regulate; that the law of Congress upon this state of facts was supreme, and that the State law must give way; that a State law, even when enacted in the exercise of the police power reserved to the State, must yield to the act of Congress upon the same subject, which is in conflict with the State law and which has been passed by Congress in the exercise of a clear power under the Constitution; that the Alabama law was in conflict with the provisions of the Federal Constitution giving Congress power to regulate commerce among the States and with the act of Congress upon that subject, and was therefore void. In the Foster case also the same doctrine was held to apply to the boat used in that case for lightering and towing.

The principles established by these cases were again repeated in Moran, Executor of Cooper, *v.* New Orleans, 112 U. S., 69.

In that case it appeared that the city of New Orleans was authorized by a State statute to levy and impose a license upon all per-

sons pursuing any trade, profession, or calling and to provide for its collection, it being declared by said statute that such license should not be considered as a tax on property. In the exercise of the power thus conferred said city passed an ordinance to establish the rate of licenses for professions, callings, and business for the year 1880, which imposed a license fee of $500 upon every member of a firm or company and upon every agency, person, or corporation owning and running tow-boats to and from the Gulf of
59 Mexico, and a license fee of $50 upon every member of a firm or company and upon every agent, person, or corporation owning and running job-boats within the corporate limits of the city. Cooper was the owner of two steam propellers, each of over 100 tons burden, duly enrolled and licensed at the port of New Orleans to be employed in the coasting trade, and employed them in towing vessels from the sea up the river to New Orleans and from that port to the sea.

The city of New Orleans brought suit against him for the license fee provided by said ordinance and recovered judgment therefor, which judgment was affirmed by the supreme court of the State. On writ of error to the Supreme Court of the United States that judgment was reversed on the ground that the ordinance imposing the license was a regulation of commerce among the States, and therefore in conflict with the Constitution of the United States and void, it being held that the case fell directly within the rules laid down *of* the Sinnot and Foster cases.

Among the propositions stated in the opinion are these:

That when a law of a State imposes a tax, under such circumstances and with such effect as to constitute a regulation of commerce, either foreign or interstate, it is void on that account; that it makes no difference that the legislative purpose was to raise money for the support of the State government and not to regulate transportation; that it is not the purpose of the law but its effect which is to be considered, and that the right of a State by the exercise of the taxing power to impede or embarrass the constitutional operations of the General Government or the rights which its citizens hold under it have been uniformly denied by that court. In further discussion of these questions it was said:

60 "Here is not a tax on the profits and income after they have been realized from the business. It is a charge explicitly made, as the price of the privilege of navigating the Mississippi between New Orleans and the Gulf in the coastwise trade, as the conditions on which the State of Louisiana consents that the boats of the plaintiff in error may be employed by him according to the terms of the license granted under the authority of Congress.

"The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade, and the State thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under and which he derives from the Constitution and laws of the United States. The Louisiana statute declares expressly that if he refuses or neglects to pay

the license tax imposed upon him for using his boats in this way he shall not be permitted to act under and avail himself of the license granted by the United States, but may be enjoined from doing so by judicial process.

"The conflict between the two authorities is direct and express. What the one declares may be done without the tax the other declares shall not be done except upon payment of the tax. In such an opposition the only question is which is the superior authority, and reduced to that it furnishes its own answer."

It will be observed that in the case above cited the State laws which are held to be an improper interference with interstate commerce were passed in the exercise of either the police power or the taxing power, and so far as our investigations have gone the
61 same thing is true of all other decisions of the Federal courts w-ere there the same principles have been enforced. The Sinnot and Foster cases involved the validity of a State statute which has no relation to the fiscal concerns of the State, but which was passed merely as a police regulation, the penalty imposed being merely by way of punishment for disobedience to its provisions. The city ordinance in question in the Moran case, on the other hand, seems to have been adopted merely as a fiscal regulation and was manifestly an attempted exercise of the taxing power. In the light of these decisions it must be held to be settled law that where a State, in the exercise of either the police power or the taxing power, passes laws which in their operation are an interference with interstate or foreign commerce which Congress has undertaken to regulate, they are in contravention of the Constitution and laws of the United States and are consequently void.

There is another class of cases, however, quite distinct from those above cited in no respect in conflict with them but involving es-entially different principles, where the exaction by a State from vessel owners of a payment of money for the right to use and navigate certain of the public navigable waters of the United States has been upheld by the Federal courts.

These are cases where the payment exacted *are* by way of compensation for improvements in water-ways and increased facilities of navigation furnished at the expense of the State. In such cases it is held that the tolls exacted are only a reasonable equivalent for benefits conferred and are in no sense an improper interference with the commerce itself.

Among cases of this character Huse *v.* Glover, 119 U. S.,
62 543, may be cited. That was a bill in equity to restrain the canal commissioners from exacting tolls upon the complainant's vessels passing through the waters of the Illinois river. The bill sets up an act of the Illinois legislature passed in February, 1867, providing for the improvement of the navigation of the Illinois river by the construction of a lock and dam at Henry and also at Copperas creek and creating a board of canal commissioners, with authority to superintend the construction of said locks and dams and to control and manage them when constructed and to prescribe reasonable rates of toll for the passage of vessels through said locks.

Said act further provided that all tolls received for the use of the locks not necessary to keep the same in repair and to pay the expenses of their collection should be paid quarterly into the State treasury as a part of the general revenue of the State. Said locks and dams were constructed at an expense of several hundred thousand dollars, which was principally borne by the State, although a small portion of it is said to have been contributed by the United States. The complainants were citizens of Illinois, and were engaged in cutting ice at Peru and other points on the Illinois river and transporting it on that river and the Mississippi river to St. Louis, Memphis, and other Southern markets, and, in connection with that business, they were also carrying on a general transportation business and were constantly using from three to six steamboats and from thirty to sixty barges, varying from 125 to 1,000 tons burden, all licensed and registered under the act of Congress. The bill alleged that prior to the construction of said dams the complainants were able to navigate said river without interruption, except such as were incident to the ordinary use of the channel in its natural state, and that said dams were an impediment in the way of the free navigation of the river and of no practical advantage to the complainants; that they had paid large sums of money for tolls upon the ton-age or measur-ment of their steamboats and barges and upon the cargoes transported thereon.

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It was alleged that said State statute was in violation of the ordinance of July 13, 1787, for the government of the territory of the United States northwest of the Ohio river, providing that the navigable waters leading into the Mississippi and St. Lawrence should be common highways and forever free to the citizens of the United States and of the States which should be admitted into the Confederacy without any tax, duty, or impost therefor, and also of the article on the Constitution of the United States which prohibits the imposing of a tonnage duty by any State without the consent of Congress. The court, in holding both these objections untenable, say:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost, or duty has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions or by the making of dams for deepening the waters or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight and the taking them on board or for the repair of vessels.

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"The state is interested in the domestic as well as the interstate and foreign commerce conducted on the Illinois river, and to increase its facilities and thus augment its growth it has full power. It is only when in the judgment of Congress its action is deemed to encroach upon the navigation of the river as a means of interstate

and foreign commerce that that body may interfere and control and supersede it. If, in the opinion of the State, greater benefit would result to her commerce by the improvements made than by having the river in its natural state, and on that point the State must necessarily determine for itself, it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. The opening of a new highway or the improvement of an old one, the building of a railroad, and many other works in which the public are interested may materially diminish business in certain quarters and increase it in others; yet for the loss resulting the sufferers have no legal ground of complaint.

"How the highways of the State, whether on land or by water, shall be best improved for the public good is a matter for State determination, subject always to the right of Congress to interpose in the cases mentioned.

"By the terms tax, impost, and duty mentioned in the ordinance is meant a charge for the use of the Government, not compensation for improvements. The fact that if any surplus remains
65 from the tolls over what is used to keep the locks in repair and for their collection it is to be paid into the State treasury as a part of the revenue of the State does not change the character of the toll or impost. In prescribing the rates it would be impossible to state in advance what the tolls would amount to in the aggregate. That would depend upon the business done—that is, the number of the vessels and amount of freight which may pass through the locks. Some disposition of the surplus is necessary until its use shall be required, and it may as well be placed in the State treasury and probably better than anywhere else." See also opinion of Mr. Justice Harlan in same case in the circuit court, reported as Huse *v.* Clover, 11 Bissell, 550.

In the foregoing case the right to charge tolls as a compensation for increased facilities in the navigation of the river is placed upon the same footing with the right to erect wharves and charge wharfage for their use by vessels navigating the river. As illustrating the rule, the case of Packet Co. *v.* Keokuk, 95 U. S., 80, is by the court cited. That was a suit brought by the city of Keokuk to recover of the packet company certain w-arfages charged under State authority, and the court, affirming a judgment of the State courts in favor of the plaintiff, said:

"If the charge is clearly a duty, a tax or burden, which in its essence is a contribution claimed for the privilege of entering the port of Keokuk or remaining in it or departing from it, imposed, as it is, by authority of the State and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such duty, but a charge for services rendered or for conveniences provided is in no sense a tax or duty. It is not a hindrance or impediment to free navigation. The prohibition to the State
66 against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance ren-

dered and facilities furnished to trade and commerce. It is a tax or duty that is prohibited; something imposed by virtue of sovereignty not claimed in right of proprietorship."

In Sands *v.* Manistee River Improvement Co., 123 U. S., 288, it was held that the exaction of tolls under a State statute for the use of an improved natural waterway is not within the prohibition of the Constitution of the United States that no State shall deprive a person of his property without due process of law; that the internal commerce of a State—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the National Government, and to encourage the growth of this commerce and to render it safe States may provide for the removal of obstructions from their rivers and harbors and deepen their channels and improve them in other ways and levy a general tax or toll upon those who use the improvement to meet their cost, provided the free navigation of the waters as permitted under and by the laws of the United States is not impaired and provided any system for the improvement of their navigation provided by the General Government is not defeated. In this case the rules established in Huse *v.* Glover, *supra*, is again affirmed. See also Transportation Co. *v.* Parkersburg, 167 U. S., 691; Escanaba Co. *v.* Chicago, *ib.*, 678; Morgan Steamship Co. *v.* Louisiana, 118 *ib.*, 455; Cooley *v.* Board of Wardens, 12 How., 299.

67 The constitutional power of the States to improve navigable waters within their boundaries, and charge all vessels navigating such improved waterways reasonable tolls or compensation for their use in their improved condition, is affirmed by following decisions of the State courts:

Kellogg *v.* Union Co., 12 Conn., 8.
Thomas Bank *v.* Lowell, 18 *ib.*, 500.
Wisconsin River Improvement Co. *v.* Manson, 43 Wis., 255.
Benjamin *v.* Manistee River Improvement Co., 42 Mich., 628.
Nelson *v.* Cheyboygan Slack Water Navigation Co., 44 *ib.*, 7.
Manistee River Improvement Co. *v.* Sands, 53 *ib.*, 593.
Carondelet Co. *v.* Parker, 29 La. An., 430.
Monongahela Bridge C-. *v.* Kirk, 46 Penn. St., 112.
McReynolds *v.* Smallhouse, 8 Bush, 447.
Osborne *v.* Boom Co., 32 Minn., 412.
See also Cooley on Const. Lim. (5th ed.), 731; Houck on Navigable Rivers, secs. 186–209.

The question presented by the present record, then, is whether the license fee imposed by the city of Chicago upon the owners of steam-tugs engaged in towing boats engaged in interstate and foreign commerce into and out of the Chicago river and harbor to and from Lake Michigan must, under the facts appearing in the stipulation, be regarded as a tax upon the commerce in which said tugs are engaged or whether it may not properly be held to be a payment exacted by the city by way of an equivalent or compensation for the use of the improved waterway provided by the city by

dredging, and thereby deep*ing*ing the Chicago river at its own expense.

68 In determining this question it should be remembered that the presumption is always in favor of the validity of a statute or of an ordinance passed in pursuance of competent statutory authority. When, therefore, the facts shown are susceptible of two constructions, one of which will support and the other defeat a statute or ordinance, the former will be adopted.

And as the burden of showing the invalidity of a statute or ordinance *it* upon him who asserts it, the intendments will all be against him, and in the absence of evidence on the subject the facts necessary to establish their validity will be presumed to exist.

The power of the General Assembly to delegate to the city of Chicago authority to deepen or otherwise improve the Chicago river and harbor will scarcely be questioned. In Gould on Waters, section 17, the author, speaking of municipal corporations, says: "They may be empowered by the legislature to pass ordinances for preservation of their harbors and water channels and the regulation of vessels and wharves, to deepen and improve rivers, or to remove and prevent obstructions therein." This court, if it has not expressly decided, it has at least recognized in various cases the same rule.

Goodrich *v.* City of Chicago, 20 Ill., 445.
Wright *v.* City of Chicago, *ib.*, 252.
Elston *v.* City of Chicago, 40 *ib.*, 514.

The General Assemby, not only in the original charter of the city of Chicago but in repeated acts of legislation since that time, has conferred upon said city the power to deepen and otherwise improve

69 the Chicago river and harbor, and also the right to exact, in some form, compensation for their use in their improved condition; but the only acts to which reference need be made are the act of February 13, 1863, reducing the charter of said city and the amendments thereto to one act, and the general act providing for the incorporation of cities and villages, in force July 1, 1872.

Subdivision 53 of section 8, chapter 4, of the former of these acts declared that "the harbor of the city shall include the piers and so much of Lake Michigan as lies within the distance of one mile into the lake and the Chicago river and its branches to their respective sources," and empowered the city, among other things, "to preserve the harbor" and "to prevent and remove all obstructions therein," and the second subdivision of said section empowered the city "to remove and prevent all obstructions in the waters which are public highways of said city and to widen, straighten, and deepen the same."

Subdivision 30 to 38 of section 1, article 5, of the latter of said acts, which we have already cited in part, gives the city council of cities power "to deepen, widen, dock, cover, wall, alter, or change the channel of water-courses; to construct and keep in repair canals and slips for the accommodation *od* commerce; to erect and keep

in repair public landing places, wharves, docks, and levees; to regulate and control the use of public and private landing places, wharves, docks, and levees; to control and regulate the anchorage, moorage, and landing of all water craft and their cargoes within the jurisdiction of the corporation; to license, regulate, and prohibit wharf-boats, tugs, and other boats used about the harbor or within such jurisdiction; to fix the rate of wharfage and dockage; to collect wharfage and dockage from all boats, rafts, or other craft
70 landing at or using any public landing place, wharf, dock, or or levee within the limits of the corporation; to make regulations in regard to the use of harbors, towing of vessels, opening of bridges."

The stipulation admits that the Chicago river, forming as it does a part of the Chicago harbor, is from time to time deepened for purpose of navigation by the city, by dredging, at its own expense. The river is thus kept in the condition necessary to its convenient navigation, if not by steam-tugs at least by the larger vessels which it is the business of such tugs to tow up and down it. The facilities for navigating the river are thus preserved and kept in existance by the city and at its expense. The amount of money annually expended by the city in dredging the river is not stated in th- stipulation, but the presumption being in favor of the validity of the ordinance in question and it being admitted that the city is from time to time expending money for dredging, it will be presumed until the contrary is shown that the amount expended has been sufficient to make the license fee exacted by the ordinance of the owners of tugs in use on the river no more than a fair equivalent therefor.

It cannot be doubted, in the light of the authorities above cited, that the city, having imposed the navigation of the river at its own expense, could, without subjecting itself to the charge of improperly interfering with interstate or foreign commerce, exact of vessels using the river in its improved condition a reasonable compensation for the improved commercial facilities thus furnished. The question is whether the license fee imposed by the ordinance can be construed as being exacted by way of compensation for bene-
71 fits conferred or whether it must be regarded as a tax for purposes of revenue.

As to the purposes for which the license fee is exacted the ordinance is silent. That merely provides that no person shall keep, own, or let for hire any tug, etc., for towing craft on the Chicago river, its branches or the slips con-ected therewith or in or about the harbor of Chicago without first obtaining a license therefor, the amount of the license fee being placed at $25 for each tug. So far as the exaction is explained by the ordinance it may be in the nature of a tax for the purpose of raising revenue or of a compensation or equivalent for money expended by the city in improving the navigation of the river. Under these circumstances it should receive that construction which will sustain rather that defeat the ordinance, if, under recognized rules of law, it is susceptible of that construction.

The city counsel, at least so long as they have not declared their purposes in passing the ordinance, should be held to have intended to act within and not in excess of their powers.

A statute should not be declared unconstitutional unless it is clear, beyond reasonable doubt, that the legislature had transcended its constitutional powers in passing it.

Home Ins. Co. *v.* Swigert, 104 Ill., 653.
Hawthorn *v.* The People, 109 *ib.*, 302.

"The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Fletcher *v.* Peck, 6 Cranch., 87.

The same rule has been applied to the question of the unconstitutionality of a municipal ordinance. Osborn *v.* Mobile, 44 Ala., 493. If, then, there is any admissible construction of the
72 ordinance which will bring it into harmony with the constitution such construction should be adopted.

That the imposition of a license fee is a proper mode of exacting compensation for benefits conferred is well supported by the authorities. Thus in Cincinnati *v.* Bryson, 15 Ohio, a license fee exacted of draymen was sustained upon the ground that it was only a mode of collecting compensation for the expense of keeping the streets in repair for their use. The court, in their opinion, say: "The employment of drays, hacks, omnibuses, and other heavy vehicles upon the pavements cause no inconsiderable amount of expenditure to the city in the way of repairing the streets and alleys. It is manifest to every one that in a large city vehicles of this description cause great destruction to the public ways, far greater than the usual ordinary travel of citizens otherwise employed. There is, therefore, no injustice in exacting a reasonable portion of the expense which such special occupations cause to the community and those which enjoy the special privilege can refuse to bear a reasonable portion of the burden but with an ill grace." The same rule is laid down in Marmet *v.* The State, 45 Ohio St., 63. In that case a statute provided that in cities of the first class no person should be engaged in the business or professions therein mentioned until he should have obtained a license therefor, and by a subsequent section of said act the owners of different kinds of vehicles used upon the streets of such cities were required to pay certain license fees. Certain persons having been convicted and fined for *for* using vehicles upon the streets of Cincinnati without a license, the cases were taken to the supreme court and in that
73 court it was urged, among other points, that said statute was not a proper exercise of the taxing power, and that said statute was therefore unconstitutional and void. The court, after considering that question, said: "By way of conclusion, without undertaking to lay down any general rule as to the power to license or tax occupations and confining our holding to the necessities of the case before us, we think it may safely be affirmed, upon both prin-

ciple and authority, that power to regulate by license and to compel payment of a reasonable fee may be maintained where a special benefit is conferred at the expense of the general public or the business imposes a special burden on the public or where the business is injurious to or involves danger to the public: and, believing that the exactions required by the sections of the law in question here fairly come within the rule thus stated, we hold them to be valid."

In City of Boston *v.* Schaffer, 9 Pick., 415, the validity of a statute authorizing the mayor and aldermen of Boston to exact a license fee from theatrical exhibitions — on the ground that it was not competent for the legislature to grant to a town or city power to assess a tax which was not general. The court, in sustaining the validity of the statute, said: "If this were a tax, the objection would be valid, but the price to be paid for the license is in the nature of an excise on a particular employment. The levying of an excise has been practiced in regard to other occupations, and the constitutionality of *is* has never been doubted.

There can, therefore, be no objection in the present case, admitting theatrical entertainments to be as meritorious as other occupations, but it seems to be peculiarly proper in employments of this kind. They require to be watched. Towns are put to ex-
74 pense in preserving order, and it is proper they should be indemnified for inconveniences or injuries occasioned by employments of this nature." To similar effect see St. Louis *v.* Green, 7 Mo. App., 468; Frommer *v.* Richmond, 31 Grat., 646; Charleston *v.* Pepper, 1 Rich. (S. C.), 364.

We are of the opinion that it is a reasonable and therefore admissible construction of both the ordinance in question and of the statute in pursuance of which it was passed that the license fees imposed upon the owners of steam-tugs and other similar crafts navigating the Chicago river were merely by way of a toll, compensation, or equivalent for the use of the river in its improved condition. Such being the case, that construction in support of the ordinance and statute is the one which must be adopted.

In this view neither the ordinance or statute is in any degree an improper interference with interstate or foreign commerce or in conflict with the Constitution or laws of the United States in that behalf. It follows that the ordinance is valid, and that the license fees sought to be recovered back in this suit were properly imposed.

The judgment will be affirmed.

Judgment affirmed.

MAGRUDER, *C. J.:*

It is desirable that the decision of this case should be such as to enable the parties interested to take it to the Supreme Court of the United States. Aside from this consideration, I think that the conclusion reached upon the former hearing was the correct one for the reasons stated in Harmon *v.* City of Chicago, 26 Northeastern Reporter, 697.

75 STATE OF ILLINOIS:

In the Supreme Court for the Northern Grand Division.

Hon. Benjamin D. Magruder, chief justice of said court:

And now comes William Harman, by Charles E. Kremer, his attorney, and complains that in the record and proceedings herewith submitted, and also in the rendition of a judgment in the case of William Harman, plaintiff, against The City of Chicago, defendant, a judgment was rendered on the second day of December, 1889, in the circuit court of Cook county, in the State of Illinois, from which judgment said William Harman took an appeal to the appellate court for the first district of the State of Illinois, where said judgment was affirmed, and from which judgment said William Harman again took an appeal to the supreme court of said State of Illinois, the last-named court being the highest court of law or of equity of said State of Illinois in which decision could be had in said suit, reversed the judgment of the said appellate court; whereupon the said city of Chicago filed a petition for rehearing, which being granted, said court, on the eighteenth day of January, 1892, affirmed the judgment of said appellate court; that in said suit there was drawn in question the validity of an ordinance of the city council of the city of Chicago, passed under and by virtue of the power and authority granted by the laws of the State of Illinois, and which said ordinance and the laws of the State of Illinois in pur-

76 suance of which the same was passed are repugnant to and in conflict with the Constitution and laws of the United States, and the said final decision of the said supreme court was in favor of the validity of the said ordinance and the laws of said State of Illinois under which the same was passed, and that there was also drawn in question the construction of a clause of the Constitution of the United States and the rights claimed thereunder by the plaintiff in said cause, and the decision was against the rights claimed by said plaintiff under said clause of the Constitution, all of which appears of record and proceedings in said suit, and the plaintiff now claims that manifest error hath happened, to the great damage of him, the said plaintiff. Wherefore he prays for allowance of a writ of error and such other process as may be necessary, so that the said cause may be submitted to the Supreme Court of the United States.

CHARLES E. KREMER,
Attorney for Plaintiff in Error.

Allowed.

BENJAMIN D. MAGRUDER,
Chief Justice of the Supreme Court of the State of Illinois.

(Endorsed:) Filed Feb. 3, 1892. A. H. Taylor, clerk.

77 Know all men by these presents that we, William Harman, as principal, and James L. Higgie, surety, all of the city of Chicago, county of Cook and State of Illinois, are held and firmly

bound unto the city of Chicago, in the State of Illinois, in the sum of five hundred dollars, to be paid to the said city of Chicago; — which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals this 28th day of January, 1892.

Whereas the above-named William Harman has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the case of William Harman against the said city of Chicago by the supreme court of the State of Illinois for the northern grand division thereof:

Now, therefore, the condition of this obligation is such that if the above-named William Harman shall prosecute his said writ of error to effect and answer all costs and damages if he fails to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WILLIAM HARMAN. [SEAL.]
J. L. HIGGIE. [SEAL.]

78 STATE OF ILLINOIS, } ss:
County of Cook, }

James L. Higgie, being duly sworn, deposes and says that he is worth the sum of thirty thousand dollars over and above all his debts and liabilities and property exempt by law from execution.

J. L. HIGGIE.

Subscribed and sworn to before me this 28th day of January, 1892.

[NOTARIAL SEAL.] CHARLES E. KREMER,
Notary Public.

I approve the above bond and the sufficiency of the surety thereto.

BENJAMIN D. MAGRUDER,
Chief Justice of the Supreme Court of Illinois.

(Endorsed:) Filed Feb. 3, 1892. A. H. Taylor, clerk.

79 In the Supreme Court of the United States.

WILLIAM HARMAN, Appellant, }
vs.
CITY OF CHICAGO, Appellee. }

Assignment of Errors.

1st. The supreme court of Illinois erred in affirming the judgment of the appellate court.

2d. That the supreme court erred in not reversing the judgment of the appellate court and in not remanding the case to the circuit court of Cook county for another hearing.

3d. That the judgment of the supreme court is contrary to law.

4th. That the ordinance of the city of Chicago contained in the

record for licensing and regulating steam tug-boats navigating the Chicago river and the harbor of Chicago is in conflict
80 with Constitution and laws of the United States.

C. E. KREMER,
Attorney for Appellant.

Endorsed on cover: Case No. 14,981. Illinois supreme court. Term No., 1022. William Harman, plaintiff in error, *vs.* The City of Chicago. Filed February 24, 1892.

147 U.S. 396

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892.

TERM NUMBER 1022.

WILLIAM HARMAN,
Plaintiff in Error,
vs.
CITY OF CHICAGO,
Defendant in Error.

Error to
Supreme Court
of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

C. E. KREMER,
D. J. SCHUYLER,
ATTORNEYS FOR PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

TERM NUMBER 1022.

WILLIAM HARMAN,
Plaintiff in Error,
vs.
CITY OF CHICAGO,
Defendant in Error.

} Error to Supreme Court of Illinois.

STATEMENT OF CASE.

This was an action brought by William Harman against the City of Chicago, in the Circuit Court of Cook County, Illinois, to recover the sum of three hundred dollars paid by him on compulsion and under protest, to the City of Chicago for licenses for steam tug-boats of which he was the manager and owner. A trial was had before the court, a jury being waived upon the following stipulation as to the facts:

"It is hereby stipulated and agreed that, for the pur-
"poses of determining the right of the defendant to re-
"quire of the plaintiff a license and impose and collect a
"fine or license fee therefor under the ordinance of
"the said defendant hereinafter set forth, the following

"are the ultimate facts under which the said license "was required, and the fine or license fee imposed and "collected, viz:"

That on the 26th day of September, 1888, the said plaintiff was the owner and manager of the following steam-tugs, viz: Tom Brown, F. S. Butler, J. H. Hackley, C. W. Parker, Bob Teed, A. B. Ward, W. H. Wolf, Crawford, G. B. McClellan, Mary McLane, Success and Wahbun; that said tugs and each of them were of twenty tons burden and upwards, and were on the said date and for a long time prior thereto had been enrolled and licensed for the coasting trade in pursuance of and under the provisions of "Title L" of the Revised Statutes of the United States, to which reference is hereby made and which are made a part hereof; that prior to the date aforesaid and on the 5th day of March, 1883, the common council of said City of Chicago, acting under the power supposed to be vested in it by chapter 24 of the Revised Statutes of the State of Illinois, and under which the said city was at said time incorporated, passed and enacted an ordinance regulating the navigation of steam-tugs and other vessels on the Chicago River and Lake Michigan and the waters tributary thereto, requiring that the owner thereof take out a license therefor, and imposing upon him a fine or penalty for failing so to do, which said ordinance is in the words and figures following:

Be it ordained by the city council of the City of Chicago:

"SECTION 1. No person or persons shall keep, use, or "let for hire, any tug or steam-barge or tow-boat, for tow-"ing vessels or craft in the Chicago River, its branches "or slips connecting therewith, without first obtaining a

" license therefor in the manner and way hereinafter " mentioned.

" SEC. 2. All applications for such license shall be " made to the mayor, and upon payment of twenty-five " ($25) dollars to the city collector, a license shall be " issued for the period of one year by the city clerk for " such tug, or steam-barge or tow-boat, and it shall be " the duty of the city clerk to keep a register of the name " of the person to whom such license is granted or trans- " ferred, the day when issued or transferred, the number " of the license, and the name and description of the tug " so licensed.

" SEC. 3. Every tug or steam-barge or tow-boat shall " have the number of the license and the name of the " owner marked on both sides of such tug, or steam-barge " or tow-boat, in plain legible figures and letters.

" SEC. 4. Any individual or person violating any pro- " vision of this ordinance shall be subject to a fine of not " less than five dollars ($5) nor more than fifty dollars " ($50) for each offense.

" SEC. 5: This ordinance shall be in force from and " after its passage."

That said steam-tugs were enrolled and licensed in the manner and for the purpose aforesaid, by the United States authorities in and at the Northern District of Illinois, in which the said defendant, the said city of Chicago, is situated, and were on the 26th day of September, 1888, and for a long time prior thereto, had been engaged in the coasting and foreign trade, and in commerce and navigation, namely, in towing vessels engaged in inter-state commerce into and out of the Chicago river and harbor from and to said Lake Michigan, and in pursuance of the

conduct of the said trade, were navigating the said Chicago river and the waters of Lake Michigan, and the tributaries thereto, which said river is from time to time deepened for navigation purposes by dredging under the direction and at the expense of said City of Chicago.

That on the said day the said city collector of the said City of Chicago, the defendant herein, notified the said plaintiff to apply for and take out a license in pursuance of the requirements of the said ordinance for each of said steam-tugs, and to pay therefor the sum of twenty-five dollars for each of said tugs, or the sum of three hundred dollars in the aggregate; that the said plaintiff thereupon notified the said collector that the said steam-tugs, and each of them, were licensed for the coasting trade, in pursuance of and in accordance with the requirements of the laws of the said United States, and were engaged in said trade on the said Chicago river and said Lake Michigan, and the waters tributary thereto, in the manner as aforesaid, and thereupon claimed to the said collector that the said ordinance was invalid, and that the said City of Chicago had no power or authority to require the said plaintiff to take out a license in pursuance of the requirements of the said ordinance, or to pay the said fee, whereupon the said collector of the said defendant caused the said plaintiff to be arrested upon a warrant issued for that purpose, and that while the said plaintiff was under arrest, he paid the said license fee under protest, and took out the license as required by the said ordinance, and as demanded of him by the said collector, which said license was thereupon issued to him.

That the amount of the fees so as aforesaid paid to the said collector for the said defendant was the sum of three hundred dollars; that the said sum was paid by the said

collector into the treasury of the said defendant, the said City of Chicago, and that the questions which arise on the foregoing state of facts are as follows, viz:

1st. Whether or not the said defendant can require the plaintiff to take out the license and collect therefor the fees provided for in the ordinance aforesaid.

2d. Whether there was vested in the defendant the power to require of the plaintiff the license and fee provided for in the ordinance aforesaid, and in the manner shown by the foregoing state of facts.

3d. Whether the said ordinance under which said license was required and the said fee was imposed and collected, is legal and binding upon the plaintiff.

4th. Whether the plaintiff is not entitled to judgment for the amount of fees so paid by him as aforesaid.

It is hereby further stipulated that the said facts may be presented to the court and tried under the pleadings as they now stand, and that an order may be entered in said suit, submitting the same to the Honorable Richard S. Tuthill for trial without the intervention of a jury, and that either party shall have the right to appeal from the decision and final judgment of the court herein in the same manner and to the same extent as they would have if the same case had been tried in the usual and ordinary way.

Dated, June 27, 1889.

SCHUYLER & KREMER,
Attorneys for Plaintiff.

JONAS HUTCHINSON,
Attorney for Defendant.

And there was also introduced in evidence on behalf of

the defendant in error an ordinance of the city council of the city of Chicago, in the words and figures, as follows:

"SECTION 1. The inhabitants of all that district of "country in the County of Cook and State of Illinois, con- "tained within the limits and boundaries hereinafter pre- "scribed, shall be a body politic under the name and "style of the city of Chicago; and by that name sue and "be sued, complain and defend, in any court; make and "use a common seal, and alter at pleasure; and take and "hold, purchase, lease and convey such real and per- "sonal or mixed estate as the purposes of the corpora- "tion may require, within or without the limits afore- "said.

"SEC. 2. The corporate limits and jurisdiction of the "city of Chicago shall embrace and include within the "same all of township thirty-nine north, range fourteen "east of the third principal meridian, and all of sections "thirty-one, thirty-two, thirty-three and fractional section "thirty-four, in township forty, north range fourteen, east "of the third principal meridian, together with so much "of the waters and bed of Lake Michigan as lies within "one mile of the shore thereof, and east of the territory "aforesaid.

SEC. 3. All that portion of the aforesaid territory "lying north of the center of the main Chicago river "and east of the center of the North branch of said "river, shall constitute the north division of said city; all "that portion of the aforesaid territory lying south of "the center of the main Chicago river, and south and "east of the center of the south branch of said river and "of the Illinois and Michigan Canal, shall constitute the "south division of said city; and all that portion of "the aforesaid territory lying west of the center of the

"North and South branches of said river and of the Illi-
"nois and Michigan Canal, shall constitute the west
"division of said city."

On a trial of the case the issues were found for the defendant; whereupon an appeal was taken to the Appellate Court for the First District of the State of Illinois, and there, there being no agreement, the case was affirmed and appealed by the plaintiff to the Supreme Court of the State of Illinois.

Upon a hearing before that court an opinion was filed by Chief Justice Magruder, reported as *Harman* v. *the City of Chicago*, 26 North-east. Rep., 697, in which the judgment of the court below was reversed and the ordinance of the city declared invalid.

Thereupon a petition for a rehearing was filed on behalf of the City of Chicago, and this petition was granted, and in an opinion by Mr. Justice Bailey (found in the record),the judgment of the Appellate Court was affirmed and the former judgment of the court reversed, and thereupon Harman applied for a writ of error and now brings the case before this court.

I.

Under this statement of facts, the only question in dispute is whether the ordinance of the City of Chicago requiring a license fee to be paid by the plaintiff for the privilege of navigating the Chicago river and harbor by the tug-boats owned and controlled by him is valid.

We contend that the ordinance in question amounts to a regulation of commerce and is contrary to the constitution and laws of the United States.

Under Title " L " of the Revised Statutes of the United States, under the head of the Regulation of Vessels in Domestic Commerce, Section 4321, we find the form of license under which the steam tugs in question were licensed, and taking this as applied to these vessels, it would be substantially this:

" License for carrying on the coasting trade. In pur-
" suance of Title " L," Regulation of Vessels in Domes-
" tic Commerce, of the Revised Statutes of the United
" States. William Harman, managing owner, of Chi-
" cago, Illinois, seaman, and master of Chicago,
" Illinois, having given bond that the steam-tug, " Tom
" Brown," whereof said is master, burden
" tons, as appears by her enrollment, dated at Chi-
" cago, the day of shall not be
" employed in any trade while this license shall continue
" in force whereby the revenue of the United States
" shall be defrauded; and having also sworn that this
" license shall not be used for any other vessel or for any
" other employment than is hereby specified, license is
" hereby granted for such steam-tug called "Tom Brown,"
" to be employed in carrying on the coasting and foreign
"trade for one year from the date hereof and no longer.
" Given under my hand and seal at the District of Chi-
" cago, this day of

.....

Deputy Collector of Customs."

It was under licenses similiar to this one that all of the steam-tugs in question were licensed. Under this license, these vessels had a right to navigate the rivers and waters of the United States for one year, while engaged in the coasting and foreign trade. The record also

shows that at the time that the license fee was exacted these vessels were actually engaged in the coasting and foreign trade, and in towing vessels engaged in interstate commerce, from Lake Michigan in the Chicago river and its branches, and towing vessels similarly engaged from said river into said Lake Michigan.

In the case of *Gibbons* v. *Ogden*, 9 Wheat., 210, the court held that vessels enrolled and licensed in pursuance of the laws of the United States, had conferred upon them as full and complete authority to carry on this trade as was within the power of Congress to confer.

The court says (referring to the first section):

"This seems to the court to contain a positive enact-"ment that the vessel it describes shall be entitled to the "privileges of ships or vessels employed in the coasting "trade. These privileges cannot be separated from the "trade, and cannot be enjoyed, unless the trade may be "prosecuted." Again the court says, "to construe these "words otherwise than as entitling the ships or vessels "described, to carry on the coasting trade, would be, we "think, to disregard the apparent intent of the act." And again, speaking of the license provided in the 4th section, the word license means, the license is general in its terms, according to the form given in the act of Congress: "License is hereby granted for the said steam-"boat (naming her) to be employed in carrying on the "coasting trade for one year from the date hereof, and "no longer."

All of the waters which these vessels navigate are navigable waters of the United States, as defined by the cases of the Daniel Ball, 10 Wall, 557; and the Montello, 11 Wall, 411. The Chicago

river was expressly held to be navigable water of the United States in the case of the *Escanaba Company* v. *Chicago*, 107 U. S., 678.

The business in which these tugs were engaged is identical with that of the vessel mentioned in the case of *Foster* v. *Davenport*, 22 How., 244. In that case, Mr. Justice NELSON, delivering the opinion of the court, said:

"It is quite apparent, from the facts admitted in the "case, that this steamboat was employed in aid of vessels "engaged in the foreign or coastwise trade and com- "merce of the United States, either in the delivery of "their cargoes, or in the *towing* of the vessels themselves "to the port of Mobile. The character of the naviga- "tion and business in which it was employed cannot be "distinguished from that in which the vessels it towed or "unloaded were engaged. The lightering or towing was "but the prolongation of the voyage of the vessels, as- "sisted to their port of destination. The case, therefore, "is not distinguishable in principle from the one above re- "ferred to."

In the cases under consideration, a neglect or refusal to pay the license is by the ordinance punished by the imposition of a fine. And a payment of the fines or stoppage of the employment of the tugs are the only alternatives.

The effect is clearly one restraining the free use of the vessel in the employment of a legitimate commerce for which it has been expressly licensed by the United States.

As was said by the Chief Justice, in the case of *Weston* v. *Charleston*, 2 Pet., 449: "If the right to impose "the tax exists, it is a right which in its nature acknowl- "edges no limit, and may be carried to any extent within

"the jurisdiction of the state or corporation which im-
"poses it, as the will of each state or corporation may
"prescribe."

A license fee may be imposed if this ordinance be valid which would be such a burden as to completely annihilate this kind of commerce.

Steam-tugs at this age are as much a necessity as the larger freighting and passenger vessels. They are not necessarily local or confined in their employment to the waters within the boundary of any state. Tugs, like vessels engaged in interstate commerce, are free to roam everywhere, and may be employed to tow a vessel into Chicago to-day, and another into Milwaukee to-morrow, and yet, under this ordinance, the owner would be liable to be fined for employing his tugs without having license for their use in the Chicago river, and still others for employing them at Milwaukee.

This ordinance require that every steam-tug, steam-barge or tow-boat, towing vessels or crafts for hire in the Chicago river, shall have a license from the City of Chicago before such vessel can enjoy the privileges conferred upon it by the federal government, under the federal license.

It is prohibitory legislation which impairs the rights of the citizen under the constitution and laws of the United States. It is clearly in conflict with the clause of the constitution which confers upon Congress the exclusive power to regulate commerce between foreign nations and among the several states. Every steam-tug or steam-barge that tows vessels or crafts in the Chicago river does so for hire. There is no gratuitous service of this kind rendered there or anywhere.

The ordinance is not limited to persons residing in the

city of Chicago, nor is it confined to the citizens of the State of Illinois. But its scope is such that it embraces all persons, non-residents as well as residents, foreigners as well as citizens.

It is not limited in its operation to tugs or steam-barges owned in the city of Chicago, but it embraces tugs owned elsewhere, tugs that come there occasionally, as well as tugs that are constantly there. The subject of Great Britain, who tows the barges hailing from the Canadian provinces, with a steamer from the same place, from the Georgian Bay or other Canadian ports into the Chicago river, is as much subject to this ordinance as the tug-owner who resides within the city and employs his tug exclusively in the Chicago river and never leaves its waters.

The citizen of any of the states bordering on the lakes, who chooses to tow his or his neighbor's vessel, must, before he can tow them into the Chicago harbor, the Chicago river or any of its branches, first obtain a license from the City of Chicago to do so. His license from the United States Government is not a passport upon these waters.

The facts in this case, both as to the character and employment of the vessel and the provisions of the ordinance in question, bring the case clearly within that of *Moran* v. *New Orleans*, 112 U. S., 69.

In that case the city of New Orleans, under the laws of the State of Louisiana, was authorized to levy and collect a license from all persons pursuing any trade, profession or calling. Under this power, the city of New Orleans passed an ordinance to establish a rate of license for professions, callings and other business for the year 1880, which assessed and directed to be collected the sum specifically set forth among others, section 39:

"Every member of a firm or company, every agency, "person or corporation, owning and running tow-boats "to and from the Gulf of Mexico, five hundred dollars.

"Every member of a firm or company, every company, "person or corporation owning and running job-boats "within the corporate limits, fifty dollars."

Cooper was the owner of two steam propellers, duly enrolled and licensed at the port of New Orleans, under the laws of the United States, to be employed in the coasting trade, and employed them as tow-boats in taking vessels from the sea up to the river to New Orleans, and from that port to the sea. The city of New Orleans brought this action against him to recover the license tax, and obtained judgment in its favor, and this judgment was affirmed by the Supreme Court of the state, from which it was taken by writ of error to the Supreme Court of the United States. In that case, the court, on page 74, say:

"It is a charge explicitly made as the price of the privilege of navigating the Mississippi river between "New Orleans and the gulf in the coast-wise trade; "as the condition on which the State of Louisiana "consents that the boats of the plaintiff in error may "be employed by him, according to the terms of the "license granted under the authority of Congress. "The sole occupation sought to be subjected to the "tax is that of using and enjoying the license of the "United States to employ these particular vessels in the "coasting trade; and the state thus seeks to burden with "an exaction, fixed at its own pleasure, the very right to "which the plaintiff in error is entitled under, and which "he derives from, the constitution and laws of the United "States. The Louisiana statute declares expressly that "if he refuses or neglects to pay the license tax imposed

" upon him for using his boats in this way, he shall not " be permitted to act under, and avail himself of the li- " cense granted by the United States, but may be enjoined " from so doing by judicial process. The conflict between " the two authorities is direct and express. What the " one declares may be done without the tax, the other " declares shall not be done except on payment of the " tax. In such an opposition, the only question is, which " is the superior authority; and reduced to that, it furn- " ishes its own answer."

In the case of *Robbins* v. *Taxing District*, 120 U. S., 593, which was a case involving the question of tfie right of the Taxing District (The City of Memphis) to collect a license tax from drummers. The court in its first proposition states:

" The constitution of the United States having given " to Congress the power to regulate commerce, not only " with foreign nations, but among the several states, that " power is necessarily exclusive whenever the subjects of " it are national in their character, or admit only of one " uniform system or plan of regulation."

This was decided in the case of *Cooley* v. *Board of Wardens*, 12 How., 299–319, and was virtually involved in the case of *Gibbons* v. *Ogden*, 9 Wheat., 1, and citing many other cases.

In the case of *Leloup* v. *The Port of Mobile*, 127 U. S., 640, Mr. Justice BRADLEY, on page 648 says:

" In my opinion such a construction of the constitution " leads to the conclusion that no state has the right to lay " a tax on interstate commerce in any form, whether by " way of duties laid on transportation of the subjects of " that commerce, or on the receipts derived from that

"transportation, *or on the occupation or business of* "*carrying it on*, and the reason is that such taxation is a "burden on that commerce, and amounts to a regulation "of it, which belongs solely to Congress. This is the re- "sult of so many recent cases that citation is hardly "necessary."

In the case of *Pullman Palace Car Company* v. *Commonwealth of Pennsylvania*, 11 Supreme Court Rep., 876, the court say: "Much reliance is also placed by the "plaintiff in error upon the cases in which this court has "decided that citizens or corporations of one state can- "not be taxed by another state for a license or privilege "to carry on interstate or foreign commerce within its "limits. But in each of those cases the tax was not upon "the property employed in the business, *but upon the* "*right to carry on the business at all.* It is, therefore, "held to impose a direct burden upon the commerce it- "self."

Moran v. *New Orleans*, 112 U. S., 69.
Pickard v. *Car Co.*, 117 U. S., 34.
Robbins v. *Tax Dist.*, 120 U. S., 593.
Leloup v. *Mobile*, 127 U. S., 64.

This line of decisions is virtually affirmed by the Supreme court in the case of the *State of Maine* v. *Grand Trunk Ry. Co.*, 12 U. S., Sup. Court Rep., 121, because of the approval of the case of the *Steamship Co.* v. *Pennsylvania*, 122 U. S., 326.

These authorities establish beyond any doubt that this ordinance is unconstitutional because in conflict with the laws of the United States. It is clearly a regulation of the business of towing vessels. The ordinance was passed under a grant to regulate, and the attempt is here made to accomplish what is given by the grant.

These tugs are engaged in interstate commerce as much so as the vessels they are towing, and the regulation of them by license is a tax imposed upon interstate commerce as directly as it is possible to impose it.

There is no more reason for imposing a license of this kind upon tugs than upon any other craft that happens to use the waters of the Chicago River and harbor. In fact, there is more reason for imposing the tax upon larger and more unwieldly vessels because of their greater draught of water, their slower progress through the bridges, their greater detention of the traffic across these bridges, and their obstruction of the free passage and use of the river and its slips.

The fact that the city has from time to time *deepened* the river was done more in the interests of these larger vessels than in the interests of the tugs; the latter could navigate in most any depth of water, whether wide or narrow, shallow or deep, while the larger vessels require greater depth of water and width of channel, and it was to accomodate this class of vessels that the river was deepened, and not on account of the tugs.

In fact, as a matter of business and profit, it would have been more to the advantage of tugs to have allowed the river to remain unimproved, because in that event a greater number of tugs would have been necessary to distribute the cargoes of the larger vessels which, in such case, would have to be transported upon lighters, and these would have to be towed by tugs.

Whatever the City of Chicago may claim for having the river deepened, such claim ought not to be made as against tugs.

II.

AS TO THE DEFENSE INTERPOSED BY THE CITY OF CHICAGO.

One of the cases relied upon by counsel for the City of Chicago, and the one upon which the *nisi prius* court held that the ordinance was constitutional, is the case of *Wiggins Ferry Company* v. *East St. Louis*, 107 U. S., 365.

This case was taken up by writ of error to the Supreme Court of the State of Illinois, and the opinion of the court is found in 102 Ill., 560. The facts in this case are chiefly these:

The Wiggins Ferry Company was authorized by the State of Illinois to maintain a ferry across the Mississippi River between the city of East St. Louis, in the State of Illinois, and the city of St. Louis, in the State of Missouri. The ferries used by this company were enrolled and licensed under the authority of the United States.

Under the authority derived from the state, the council of the city of East St. Louis passed an ordinance compelling keepers of ferries to pay $50 license fee for each boat plying between that city and the opposite bank of the river, for one year. This ordinance was amended, and the license fee increased to $100. It was to recover the license provided by this ordinance that the city of East St. Louis brought suit against the ferry company.

It was claimed by the ferry company that the ordinance was invalid because in conflict with the clause of the constitution that the United States vested the power to regulate commerce in Congress. The Supreme Court of the state in deciding the case held, that the regulation of ferries was not a regulation of commerce, and that the

power to regulate ferries had never been surrendered to the general government, but still remained in the state.

Citing,

Gibbons v. *Ogden*, 9 Wheat., 1.

Also:

Conway v. *Taylor*, 1 Black, 603.

The Supreme Court of the United States, referring to these cases, declared that the act of the legislature under which the ordinance of the city of East St. Louis was authorized did not invade the exclusive power of Congress to regulate commerce.

Beginning with the case of *Gibbons* v. *Ogden*, the Supreme Court of the United States have held to the present date, that the regulation of ferries was not a regulation of commerce.

The distinction between that case and the one at bar is the same difference that there is between a ferry and a tug-boat.

There is no similarity between a steam-tug and a ferry-boat. The employment of the two classes of vessels is radically different, and it is clear that tugs can in no case be classed with ferries unless specially engaged in performing the services of a ferry. It is not claimed that such was their employment in this case.

The position taken by counsel for the City of Chicago and the one adopted by the Supreme Court of the State of Illinois, in this case is, that the license fee provided by the ordinance is in the nature of a toll or compensation for the use of the Chicago river, as *deepened* under the direction and at the expense of the City of Chicago, and the case of *Huse* v. *Glover*, 119 U. S., 543, is relied upon as the authority for the position thus taken.

Our answer to this is, that the case has no application whatever, because the fee demanded by the city in the ordinance *is not a toll or compensation in the nature of tolls*, neither the ordinance nor the stipulation of facts show that the license fee is in any way connected with the deepening or improvement of the river.

The plain import of the language is, that it is a tax levied upon the occupation of towing vessels, and it was not claimed that it was anything else until the petition for a rehearing in the Supreme Court was filed, and I doubt if the argument would have had any force at that time, had it not been coupled with a plea for the decision in favor of the city, on the ground that the latter had no appeal to this court, while the plaintiff in error had.

The city had no authority from the state to construct canals and locks, or to collect tolls for their use.

In the case of *Huse* v. *Glover*, the right to improve the Illinois river was authorized by a special Act of the legislature of the state; and the same Act also provided for the collection of tolls from all vessels using the river when improved.

It is not claimed that there was a special Act authorizing the City of Chicago to construct canals or locks. The grant under which it is sought to bring the ordinance in question is a general one, given to all cities and villages alike, and clearly contemplated the right to improve waterways entirely within the state, and its provisions cannot be extended so as to embrace navigable waterways of the United States.

The provisions of the General Acts of the State of Illinois are not necessarily repugnant to or in conflict with the constitution of the United States, because if confined

within legitimate bounds they must be held to apply only to such waters as are within the boundaries of the state and over which the general government has no jurisdiction.

The act only transcends its legitimate and proper purpose when it encroaches upon the rights of navigation granted under the federal constitution and laws to the public upon the navigable waters of the United States.

There is no provision in the statute which authorizes the construction or maintenance of locks, nor is there any provision vesting power in the City of Chicago, or any other city or village of the State of Illinois, to collect tolls or other compensation for the use of waterways within the limits of any town, village or city in the state.

It will be noticed that the city, village and town act, Rev. Stat., 219; Sec., 36 authorizes cities, villages and towns to "fix the rate of wharfage and dockage."

"Sec. 37. To collect wharfage and dockage from all "boats, rafts or other craft landing at or using any public "landing place, wharf, dock or levee within the limits of "the corporation."

These provisions are such as are not repugnant to the federal constitution or laws as they are not a tax upon any craft for the right of navigation, but are fees exacted for a benefit conferred, viz. *the use of the wharves and docks.*

In all of the cases cited by the Supreme Court of Illinois, in this case, the authority granted by the different state legislatures for imposing the toll or compensation was provided in clear and explicit language and nothing was left for construction. The purport and object was so apparent that no doubt arose.

Here there is not alone doubt, but an absolute absence of the necessary language to express what is claimed by counsel.

Since the decision of *Huse* v. *Glover* the Supreme Court of the United States have decided the case of *Sands* v. *Manistee River Improvement Co.*, 185 U. S. 288, and on page 294 draw a clean distinction between *tolls and taxes or license fees* of the character of those under consideration. The court uses the following language:

"There is no analogy between the imposition of taxes "and the levying of tolls for the improvement of high- "ways, and any attempt to justify or condemn proceed- "ings in one case by reference to those in the other must "be misleading. Taxes are levied for the support of the "government and their amount is regulated by its neces- "sities. *Tolls are compensations for the use of an- "other's property, or of improvements made by him*, and "their amount is determined by the cost of the property "or the improvements, and consideration of the return "which its value or expenditures should yield."

This would seem to be conclusive of the question, and we would suggest before leaving this branch of the case that the case does not fall within that class of authorities based upon the fact that Congress has not passed proper exactments for carrying out the mandate of the constitution, as it appears from the record in this case that the enrollment and license are statutory requirements of the Federal government and not such a requirement as to the direct regulation of interstate commerce within the meaning and intent of the constitution; so that at the time this license tax was imposed upon the plaintiff in error, the matter had already been disposed of by the Federal government, and the state was, therefore, with-

out authority, and could not confer upon the city a power which it did not possess.

III.

Counsel for the city claim that the case of *Huse* v. *Glover* is "decisive of the question here dis-"cussed." It is evident from the reading of that that case that the court, in its decision, did not consider that it was analogous to the *Moran case* or was in conflict with the principles laid down in the latter case. *The Moran case* is not alluded to in *Huse* v. *Glover*, and it is not to be supposed, if there had been any conflict or even analogy, that it would have been omitted from the citations in that case, as it is thought that the distinction between the *Moran case* and the case at bar, as claimed by counsel, can make no difference with the rights of the city to impose upon the plaintiff the tax in question. It is believed by us that the *Moran case* controls and is decisive of the question involved in this case. The point, therefore, for further discussion is, is the case of *Huse* v. *Glover*, in conflict with the *Moran case* or with the opinion in this case to any extent, or to such an extent as to make it controlling? The decision in the Moran case, as we have already seen, is based upon the fact that the tow-boats of the plaintiff in that case were enrolled and licensed for the coasting trade, in pursuance of the federal statute, and at the time the license was imposed were actually engaged in interstate commerce between New Orleans and other places on the Misssisippi river, and it was therefore held that the license imposed by the city was such a regulation of commerce as to bring it within the constitutional inhibition, and in derogation of the

rights of the owners of vessels navigating the river. And it is further thought that it cannot be urged with any force of argument that the right to compel payment of the license fee in that case would have been any different or greater under the law, if it had appeared in the record that the city of New Orleans, had from time to time, deepened the Mississippi river, at its own expense, and for the purpose of promoting and facilitating its navigation, for the reason that the right of navigation existed without the improvement, and was paramount to all others, and hence the fact that the city from time to time, improved the river for the purposes of navigation, cannot afford any ground for the imposition of a license or tax, which amounts to a regulation of commerce, or even attempt to do so.

It must be remembered moreover, that in this case the record shows that fees imposed by the ordinance in question, were license fees; *i. e.*, a tax which the plaintiff, the owner of the tugs, *was compelled to pay as the price or privilege of navigating, and doing business on the Chicago river*, and that until such payment was made he was not only liable to arrest, but was prohibited from operating his tugs. The charge or fee, was not a toll, nor was it a tax, in the nature of a toll, in any sense of the word.

Sands v. *Manistee River Imp. Co.*, 123 U. S. 294.

It was a license fee, a tax, and this distinction, though not in express terms, is clearly made by Mr. Justice BRADLEY, in the case of *LeLoup* v. *the Port of Mobile*, 127 U. S., 640.

See also:

Phila. & S. Steamship Co. v. *Penn.*, 122 U. S., 326.

West. Union Telegraph Co. v. *Mass.*, 125 U. S., 530.

And other cases cited with approval and decided since *Huse* v. *Glover*.

The decision in the case of *Huse* v. *Glover*, as we have seen, is distinctly and emphatically placed on the ground that the improvement of the Illinois river, at Henry and Copperas creek, by the state and the United States, was by a special grant of the state legislature for that purpose, with the *power to exact a reasonable rate of tolls* from vessels passing through the locks constructed under this grant. On page 544, Mr. Justice FIELD says:

"By a clause in one of the acts, it was provided that "all tolls received *for the use of the locks* not necessary to "keep the same in repair and to pay the expenses of their "collection, should be paid quarterly into the state treasury "as a part of the general revenue of the state. * * * "The work was constructed at the expense of several "hundred thousand dollars, which was principally borne "by the state. It is represented that a small portion was "contributed by the United States. Those of Henry "were completed in 1872, and those at Copperas creek "in 1877, and the commissioners prescribe rates of toll "*for the passage of vessels through the locks*, the rates "being fixed per ton according to the tonnage measure-"ments of the vessels and the amount of freight carried." And on page 548, after discussing the right to exact these tolls, further says: "The *exaction of tolls* for passage "through the locks *is a compensation for the use of arti-*

"*ficial facilities constructed, and not as an impost upon the* "*navigation of the stream.*"

It is apparent from the foregoing quotations that the state did not attempt to confer upon its commissioners the power to exact tolls as the price or privilege of navigating the river, but simply for the use of the locks, which was in one sense an improvement to the river navigation, and it is thought if such a right had been conferred upon the state, the exercise thereof would fall clearly within the principle in the *Moran case* and be held to be an attempt to regulate the commerce within the meaning of the constitution.

The distinction between tolls and taxes, or license charges, is clearly defined, as we have seen, in the case of *Sands* v. *Manistee River Imp. Co.*, *supra*, and in addition to the distinction there made, it may be urged that the parties making the improvements in the Illinois river under the grant from the state, were doubtless compelled to exact not only a reasonable but a uniform toll for all vessels passing the locks, and that such toll was not an exaction or price of navigating the river, but simply compensation for the improvement of the property of the state by the construction of the locks in question; and while it is true that the building of the dam and the construction of the locks may have improved the navigation of the river, still, it does not follow that such an improvement would warrant the state in exacting an imposition on interstate commerce in the form of a tax as the price or privilege of navigating the river.

The contention of the plaintiff, however, is that whether the power to impose a license fee or tax like the one in question, exists by grant or by implication, can make no difference, for the obvious reason that, as has

already been seen, Congress has provided a mode for licensing vessels of the character of the tugs of the plaintiff, and when the plaintiff complied with the federal statute and procured his tugs to be enrolled and licensed for the coasting trade, he had paid all the license fees that could in any event be exacted.

The case of *Huse* v. *Glover*, therefore, and kindred cases cited by counsel, are clearly distinguishable from the case at bar and have no application to the facts here, for the reasons above stated, and which are here re-enummerated:

1st. That the license, charge or tax is not a toll within the meaning of the decision controlling this case, and other federal decisions.

Sands v. *Manistee R. Imp. Co., supra.*

2d. That there is no special grant or power conferred on the city by its charter to fix and collect tolls of any kind from any vessel navigating the Chicago river and engaged in interstate commerce or otherwise.

3d. That the tugs of the plaintiff, at the time the license was exacted and the fees imposed, were already licensed and enrolled, in pursuance of the federal authority.

4th. That the owner could not, therefore, be called upon to pay another license fee; and,

5th. That the tolls in the House case were not exacted as the price or privilege of navigating the Illinois river, but as a compensation for passing the locks constructed in the river by the state.

(*a.*) The numerous cases cited by counsel, reviewing and affirming laws and ordinances regulating the travel and traffic of streets and public highways, and

license fees for the use of the same, as well as the numerous dockage, wharfage and pilot fee cases, can have no application to the principle involved in this case, for the simple reason that license fees, tolls and taxes for the use of public streets, public highway, sturnpikes, toll bridges, plank roads and dockage, and wharfage and pilot charges have nothing whatever to do with charges imposed for the privilege of navigating the streams upon which the docks, wharfs or pilot charges may be imposed by vessels engaged in interstate commerce; and, therefore, we repeat the assertion that these cases cast no light upon the principle involved in this case, and, hence, shall not further burden the court with the consideration of the principles therein discussed and decided.

(*b.*) Nor have we any criticism to make with that class of cases cited, which apparently tend to hold that the State of Illinois can delegate to the city the power to improve and regulate the navigation of the river where such improvements and regulations are not in conflict with the federal power and are tantamount to a regulation of commerce. We do not, therefore, consider that the discussion of these questions will add anything to what has already been said upon the point involved.

There is nothing in this record in any way tending to show or throw any light upon the nature and extent of the city's improvement of the river except the recital quoted in the petition for rehearing; and that in fact does not, nor is there anything tending to show that the people of the city of Chicago, including the plaintiff, were not assessed and taxed for whatever improvements have been made. The *presumption*, however, is that the improvements have been paid for and by the people in the ordinary way, namely, by special assessments and taxation, and the irres-

istible conclusion, therefore, is that the contention of the plaintiff is correct that the imposition of the tax and charge upon his business is for the price or privilege of navigating the Chicago river, and not a legalized toll, and that the same is imposed for the purpose of raising revenue to carry on the municipal government and not for the purpose of reimbursing the city for the expend tures in the deepening of the river.

The case of

Kellogg v. *Union Co.*, 12 Conn., 8,

relied upon in the State Supreme Court by counsel, proceeds directly upon the theory that the plaintiffs in that case were entitled, under *a private grant, to impose a toll on the tonnage* of vessels for the navigation of the Connecticut river, as improved by them, and that such tolls were imposed for the purpose of *reimbursing* them for the improvements made by them in the river, and not an *impost* upnn the *business* of the owners of vessels navigating the river, or a charge upon interstate commerce, and this position is fully sustained in the case of the *Thames Bank* v. *Lovell*, 18 Conn., 499, and also cited by counsel. In that case the opinion shows not only that the plaintiffs expended large sums of money in the improvement of the River Thames, and that under the grant authorizing the improvement they were authorized to levy tolls for the purpose of reimbursing them therefor, but fully sustains the position of the plaintiff in this case, and in referring to the case of *Kellogg* v. *Union Company*, *supra*, on page 510, the court say:

"The doctrine of that case, as we now recognize it, is "that Congress, by the Constitution of the United States, "has the exclusive right to regulate commerce with for-

"eign nations and among the several states; *but that an* "*act of a state legislature, imposing reasonable tolls, as a* "*compensation for rendering navigable, or more exten-*"*sively so, a river within its own borders, is constitutional,* "unless it *conflicts* with the actual exercise of the powers "of Congress." The power to regulate commerce, says Chief Justice MARSHALL, in *Gibbons* v. *Ogden*, 9 Wheat., 1, "is to prescribe the rule by which commerce is to be "governed." And in the same case, JOHNSON, J., says that "it is no objection to the existence of distinct, sub-"stantive powers, that in their application they bear upon "the same subject."

CONGRESS HAS ASSUMED CONTROL OF THE CHICAGO RIVER.

Beginning with the act of Congress passed July 5, 1884, amended August 11, 1888, and again September 19, 1890, Congress has affirmatively acted and assumed control of all navigable waters of the United States. Section 4 of the amended act of September 19, 1890, provides:

"That whenever the Secretary of War shall have good "reason to believe that any railroad or other bridge now "constructed, or which may hereafter be constructed "over any of the navigable water-ways of the United "States is an unreasonable obstruction to the free navi-"gation of such waters on account of insufficient height, "width of span, or otherwise, or where there is diffi-"culty in passing the draw-openings or the draw-span of "such bridge by rafts, steam-boats, or other water-craft, "it shall be the duty of said secretary, first giving the "parties reasonable time to be heard, to give notice to

"the persons or corporations owning or controlling such "bridge so to alter the same as to render navigation "through or under it reasonably free, easy and unob- "structed; and in giving such notice he shall specify the "changes required to be made, and shall prescribe in "each case a reasonable time in which to make them. If "at the end of such time the alteration has not been "made, the Secretary of War shall forthwith notify the "United States District Attorney for the district in which "such bridge is situated, to the end that the criminal pro- "ceedings mentioned in the succeeding section may be "taken."

The Chicago river, as decided by the case of *Escanaba Co* v. *Chicago*, 107 U. S., 678, is navigable water of the United States, and being navigable from Lake Michigan by the largest vessels on the great lakes, carrying thousands of tons of cargo, it is clearly within the spirit and letter of the provisions of the several acts of Congress above referred to.

The City of Chicago and the State of Illinois are clearly bound by all the provisions of this act of Congress. It applies to the Chicago harbor and river, and is intended to preserve and protect the rights of navigation upon its waters and the "navigable waterways of the United "States." It was designed for the purpose of regulating the construction of bridges, piers and wharves in such a manner as best to preserve the rights of navigation and interests of interstate commerce.

It is a right, although not previously exercised, clearly derived under the commercial clause of the constitution, and one which, until the passage of these acts of Congress, was not exercised.

It has been repeatedly held that when Congress inter-

poses and assumes control of the various navigable waterways such control must necessarily be exclusive of all state interference.

Under these acts of Congress it is clear that even the State of Illinois or the City of Chicago, under grant from the state, would not have a right to construct bridges over the Chicago river which might obstruct or abridge the reasonable use of the river for navigation purposes. And while the records of the War department at Washington are not accessible to us at this time, we may be pardoned, therefore, for saying to the court that they will show the rights granted by the several acts of Congress have been exercised by the Secretary of War in the case of construction or attempted construction of a bridge across the Chicago river at Canal street.

If the Chicago river was a waterway exclusively within the territory of the state and not accessible to vessels engaged in interstate commerce, there would be no doubt as to the right of the city to impose the license fee demanded in this case. But as the Chicago river is a navigable water of the United States clearly within the provisions of the recent acts of Congress assuming the control of such waterway for the purposes of preserving the rights of navigation, the City of Chicago has no right to impose conditions or exact compensation of any kind or in any form for the right or privilege of navigating the waters of the Chicago river and harbor.

It does not appear from the record in this case that the *deepening of the Chicago river for the purposes of navigation under the direction of the City of Chicago* was an improvement; *non constat*, it might have been made necessary by reason of the accumulations of deposits made by the residents of the city. It is a matter of com-

mon knowledge that the sewage, garbage and other deposits which from a large city find their way into the river, are such as must tend to and do shallow the stream, so that from time to time it is absolutely necessary, in order that it may not become unnavigable, that these deposits should be removed.

Such removal doubtless deepens the river for navigation, but this would not be necessary but for the fact that a large population reside in the immediate vicinity of the river, and such deepening is simply repairing the wrong against the public right of navigation, as well as against the best interests of people of the City of Chicago. It was simply repairing what had been impaired not by tugs or vessels but the inhabitants of the City of Chicago.

There is therefore no virtue in the claim of the city for the *alleged* benefits conferred by the deepening of the river.

No charge has ever been made to any vessels for the use of the *deepened* river, and none is contemplated by the ordinance.

The ordinance clearly imposes a tax on the right of the plaintiff in error to engage in inter state commerce, and it is therefore in conflict with the federal constitution and laws.

Respectfully submitted.

C. E. KREMER,
D. J. SCHUYLER,
Attorneys for Plaintiff in Error.

CHICAGO, December, 1892.

147 US 396

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892.

CASE NUMBER, 14,981. TERM NUMBER 1022.

WILLIAM HARMON,
Plaintiff in Error,
vs.
CITY OF CHICAGO,
Defendant in Error.

Error to Supreme Court of Illinois.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

JOHN S. MILLER,
FOR DEFENDANT IN ERROR.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.

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BRIEF FOR DEFENDANT IN ERROR.

MAY IT PLEASE THE COURT:

The facts in this case were set out in a stipulation between the parties, which is quoted in full in brief of plaintiff in error (pages 1–5) and we shall not repeat the same here.

The power of the city council to pass the ordinance in question, under the charter of the city, is clear. The city of Chicago has been, since April 23, 1875, incorporated under the general act of April 10, 1872, (Rev. Stat. Ill., Chap. 24), and that act, together with such provisions of its former charter as are not inconsistent therewith, form the charter of the city. By that act, among the powers of the city council are these:

"30. To deepen, widen, dock, cover, wall, alter or "change the channel of water courses.

"31. To construct and keep in repair canal and slips "for the accommodation of commerce.

"32. To erect and keep in repair public landing places, "wharves, docks and levees.

"35. To license, regulate and prohibit wharf-boats, "tugs and other boats used about the harbor or within such jurisdiction.

"38. To make regulations in regard to the use of har- "bors, towing of vessels, opening and passing of bridges." (1 Starr & Curtis' Ann. St., pp. 465, 466; Rev. Stat. Ill., Ch. 24, Art. 5, Sec. 1, Cl. 30, 31, 32, 35, 38.)

It cannot be claimed by plaintiff in error that the ordinance is not authorized by the charter of the city, if it was in the power of the General Assembly of Illinois to vest that power in the city council.

The Supreme court of the state, in its opinion in this case sustaining the ordinance in question as valid, based its decision upon the ground that as the Chicago river had been improved as a waterway by the city of Chicago at its expense, the license fee fixed by the ordinance is to be sustained as a payment exacted by the city by way of an equivalent or compensation for the use of the improved waterway so provided by the city. The opinion of the Supreme court of Illinois is contained in the record at pages 24–40 of the printed record herein, and we beg leave to refer to it as a very able and sound presentation of the grounds upon which that decision was based.

It was stipulated between the parties that for the purpose of determining the right of the City of Chicago to require of the plaintiff a license, and impose and collect a license fee therefor under such ordinance the "ultimate facts" under which the said license was required, and

the license fee imposed and collected, were, as in the stipulation recited; and, among such ultimate facts, the stipulation agrees that the Chicago river is from time to time deepened for navigation purposes by dredging under the direction, and at the expense of said City of Chicago.

The question of the validity of this ordinance of the City of Chicago involves also the validity of the provisions of the act of the General Assembly of Illinois under which the city passed the ordinance in question. As we have seen, this provision of the statute amply authorizes the passage of this ordinance, if these provisions of the statute are valid. The question, therefore, really is as to the power of the Legislature of Illinois, under the circumstances and conditions shown by this record to exist, to vest in the city council the power to license these tugboats, and exact the payment by them of the license fee provided for by this ordinance, in order to entitle them to navigate the Chicago river.

A statute of the state will not be declared unconstitutional unless the conflict between the statute and the constitution is clear.

And the same rule applies to the question of the constitutionality of a municipal ordinance, as held by the Supreme court of Illinois, in this case.

Osborne v. *Mobile*, 44 Ala., 493.

If the license fee in this case can, by a reasonable construction of the ordinance, and the facts and evidence in this case, be regarded as a mode of exacting compensation for benefits conferred by the city of Chicago in providing an improved waterway, then such conclusion will be adopted.

There can be no question, that the imposition of a

license fee is a proper mode of exacting such compensations for benefits conferred.

Cincinnati v. *Bryson*, 15 Ohio R., 625;
Marmet v. *State*, 45 Ohio S., 63;
City of Boston v. *Shaffer*, 19 Pick., 415;
St. Louis v. *Green*, 7 Mo. App., 468;
Frommen v. *Richmond*, 31 Gratt., 646;
Charleston v. *Pepper*, 1 Rich. (S. C.), 364.

In *Marmet* v. *State*, 45 Ohio St., 63, a statute provided that in cities of the class mentioned, the owners of different kinds of vehicles used upon the street, should pay certain license fees. And this was sustained on the ground that "power to regulate by license and to compel the payment of a reasonable fee, may be maintained where a special benefit is conferred at the expense of the general public, or the business imposes a special burden on the public, or where the business is injurious to, or involves danger to the public."

So, in *Cincinnati* v. *Bryson*, 15 Ohio R., a license fee exacted of draymen was sustained upon the ground that it was only a mode of collecting compensation for the expense of keeping the streets in repair for their use.

The license fee exacted in this case can be sustained as an exaction or compensation for the benefits conferred by the improvement by the city of Chicago of the waters in question over which the jurisdiction of the city extends. In such cases it has been settled by the repeated decisions of this court that the tolls or compensation exacted are to be sustained as a reasonable equivalent for such benefits conferred, and that they are in no sense an improper interference with commerce.

Huse v. *Glover*, 119 U. S., 543.
Packet Co. v. *Keokuk*, 95 U. S., 80.

Sands v. *Manistee Improvement Co.*, 123 U. S., 288.
Transportation Co. v. *Parkersburg*, 107 U. S., 691.
Escanaba Co. v. *Chicago*, 107 U. S., 678.
Morgan's Steamship Co. v. *Louisiana*, 118 U. S., 455.
Cooley v. *Board of Wardens*, 12 How., 299.

In *Huse* v. *Glover*, 119 U. S., 543, a bill was filed to restrain the canal commissioners from exacting tolls upon the vessels of plaintiff passing through the waters of the Illinois river. The legislature of Illinois had passed an act providing for the improvement of the navigation of the Illinois river by the construction of a lock and dam at Henry, and at Copperas creek, and creating a board of canal commissioners, with authority to superintend the construction of locks and dams, and to control and manage them, and to prescribe rates of toll for the passage of vessels through said locks; and also providing that all tolls received for the use of the locks, not necessary to keep the same in repair and pay the expense of collection, should be paid into the state treasury as a part of the general revenue of the state.

The lock and dams were constructed, principally at the expense of the state, although a small portion of the expense is said to have been contributed by the United States. The complainants were engaged in inter-state commerce, and employed therein steamboats and other vessels, all licensed and registered under the act of Congress. The bill alleged that prior to the construction of said dams, the complainants were able to navigate said river without interruption, except such as was incident to the ordinary use of the channel in its natural state, and

that said dams were an impediment in the way of the free navigation of the river, and of no practical use to complainants. And the bill alleged that said statute was in violation of the provision of the ordinance of 1787 for the government of the Northwest Territory, that the navigable waters leading into the Mississippi and St. Lawrence rivers should be common highways, and forever free to the citizens of the United States and of the states, without any tax being imposed therefor, and was also in violation of the article of the Constitution of the United States prohibiting the imposition of a tonnage duty by any state without the consent of Congress. This court sustained the validity of the statute, and said:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels.

"The state is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois river, and to increase its facilities and thus augment its growth it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere and control or supersede it. If in the opinion of the state, greater benefit would result to her commerce by the improvements made than by leaving the river in its

natural state—and on that point the state must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. The opening of a new highway, or the improvement of an old one, the building of a railroad, and many other works in which the public is interested, may materially diminish business in certain quarters and increase it in others; yet, for the loss resulting, the sufferers have no legal ground of complaint. How the highways of a state, whether on land or by water, shall be best improved for the public good, is a matter for state determination, subject always to the right of Congress to interpose in the cases mentioned.

By the terms tax, impost, and duty, mentioned in the ordinance, is meant a charge for the use of the government, not compensation for improvements. The fact that if any surplus remains from the tolls over what is used to keep the locks in repair, and for their collection, it is to be paid into the state treasury as a part of the revenues of the state, does not change the character of the toll or impost."

It can make no difference what form the compensation is made to take—whether as toll, or wharfage, or license fee. The gist of the question is, whether the charge made, whatever the form may be, can be regarded and sustained as compensation for benefits conferred by the authority imposing the charge. In the case last cited, it was said that the "tolls" in that case "are like charges "for the use of wharves and docks constructed to facili- "tate the landing of persons and freight, and the taking "them on board, or for the repair of vessels." In *Packet Co.* v. *Keokuk*, 95 U. S., 80, the charges took the form of wharfages charged under the authority of the state. And this court held that "a charge for services rendered or "for conveniences provided, is in no sense a tax or a duty. "It is not a hindrance or impediment to free navigation. "The prohibition to the state against the imposition of a

" duty of tonnage was designed to guard against local " hindrances to trade and carriage by vessels, not to re- " lieve them from liability to claims for assistance ren- " dered and facilities furnished for trade and commerce."

In the case of *Sands* v. *Manistee Improvement Co.*, 123 U. S., 288, this court again sustained the right of the state to exact compensation for the use of an improved natural waterway, and held that such a charge is not within the prohibition of the Constitution of the United States. The court held that the internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under the control of the state, as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the states may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in *Mobile County* v. *Kimball*, the free navigation of those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. The court, speaking by Mr. Justice FIELD, said:

" The Manistee river is wholly within the limits of Michigan. The state, therefore, can authorize any improvement which, in its judgment, will enhance its value as a means of transportation from one part of the state to another. The internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the states may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in *County of Mobile* v. *Kimball*, the free navigation of those

waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. (102 U. S., 691, 699.) And to meet the cost of such improvements, the states may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks, constructed to facilitate commerce in loading and unloading vessels. (*Huse* v. *Glover*, 119 U. S., 543.) Regulations of tolls or charges in such cases, are mere matters of administration, under the entire control of the state."

The constitutional power of the several states to improve navigable waters lying within their boundaries, and to charge all vessels navigating such improved waterways reasonable tolls or compensation for their use in their improved condition, is not only supported by the decisions of this court but by many decisions of the state courts. A large number of these cases are referred to in the opinion of the Supreme court of Illinois. (Printed record., 36.)

The Chicago river and harbor of the city of Chicago lie within the territorial limits and jurisdiction of the city. A large portion of the harbor of Chicago is the Chicago river. And the record shows that the Chicago river is from time to time deepened for purposes of navigation, under the direction and at the expense of the city of Chicago. As early as 1851 the Legislature recognized and granted the power to the city to widen and improve the river. Sec. 13 of the act of the Legislature of Illinois of February 14, 1851, provided as follows:

"Nothing herein contained shall authorize the common council (of the city of Chicago) to discontinue or contract any street or highway, or any part thereof, except for the purpose of widening and improving the river, and making basins and slips, without the consent, in writing, of all persons owning land adjoining said street or alley."

In the first charter of the city of Chicago, approved March 4, 1837, power was given to prevent all obstructions of the waters and of public highways in said city; to make wharves and slips at the end of streets, on property belonging to the city, and to alter, widen, contract, straighten, and discontinue the same, and to appropriate land necessary therefor, and to make basins and slips within the city. It is a matter of which this court will take notice, that as early as 1852 the city of Chicago was engaged in the improvement of this river, because, by act approved July 22, 1852, Congress authorized the city to excavate a portion of the military reservation at Chicago (which lay upon the south of the bank of the river, between State street and the lake, in Section 10), in pursuance of a memorial from the city to Congress, and according to a plan which had been adopted by the city and was set forth in said memorial, for the purpose of the improvement of the navigation of the Chicago river. (10 U. S. Stat. at Large, p. 24.) The United States has never appropriated or expended any money upon this river, except near the mouth, although the river is navigable, since its improvement, for a number of miles from its mouth through the city, and is improved by many miles of docks and wharves.

This court will take judicial notice of the condition and navigability of waters. "We are supposed to know "judicially the principal features of the geography of our "country, and, as a part of it, what streams are public "navigable waters of the United States." (*Montello*, 11 Wall., 414.) Equally so will the court take notice of the former navigability and non-navigability of public waters.

In *Escanaba Co.* v. *Chicago*, 107 U. S., 678, this court said:

"The (Chicago) river and its branches are entirely within the State of Illinois, and all of it, and nearly all of both branches, that is navigable, are within the limits of the city of Chicago. The river from the junction of its two branches to the lake is about three-fourths of a mile in length. The branches flow in opposite directions, and meet at its head, nearly at right angles with it. Originally the width of the river and its branches seldom exceeded 150 feet; of the branches and fork it was often less than 100 feet, *but it has been greatly enlarged by the city for the convenience of its commerce.* The city fronts on Lake Michigan and the mouth of the Chicago river is near its center. * * * The State of Illinois, within which—as already mentioned—the river and its branches lie, has vested in the authorities of the city jurisdiction over bridges within its limits; their construction, repair and use; *and empowered them to deepen, widen and change the channel of the stream.* * * *

"*As to the appropriations by Congress: No money has been expended upon the improvement of the Chicago river above the first bridge from the lake, known as the Rush street bridge. It appears from the testimony in the record that the money appropriated by Congress has been expended almost exclusively upon what is known as the 'outer harbor of Chicago'; a part of the lake surrounded by breakwaters. The improvements upon the river above the first bridge do not represent any expenditure of the government.*"

It would, therefore, seem very clearly to appear that the navigability of the Chicago river has been secured almost entirely by the expenditure of municipal funds; that not only have the proprietors of tug boats been furnished with added convenience for the transaction of their business, but that the facilities for the transaction of their business have been furnished by the city of Chicago; that these boats never could have so operated upon the waters of the Chicago river as they originally were, and that the amount of compensation required by the city is so small

as to have occasioned no complaint, even on the part of plaintiff in error.

In the respects above suggested, this case is totally unlike any of the cases in which it was held that the exactions sought to be imposed were unauthorized; and is similar to those cases in which it was held that the exaction could be collected for conveniences furnished; not only so, but this case is more strongly in favor of the city than any of the authorities cited by either party. For not only have these tug owners enjoyed *added conveniences*, but they have constantly made use of that condition of navigability which was furnished largely by the expenditure of the city's money, and without which they could have had no such opportunity to carry on their business at all.

The case of *Cooley* v. *Wardens, etc.* (12 How., 299), involved the validity of a law of the State of Pennsylvania, which required all vessels to pay "half pilot rates" where the master should refuse to take a pilot on board, and pay him the regular amount for services to be rendered. This court held such law valid, and that the same was not an infringement upon the rights of commerce, as granted by the constitution and acts of Congress. The court said:

"Imports and duties on imports, exports and tonnage, were then known to the commerce of the civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial states enforce their pilotage laws, as they were from charges of wharfage or towage, or any other local port charges for services rendered to vessels or cargoes, and to declare that such penalties or pilot fees are embraced within the words imports or duties on imports, exports or tonnage, would be to confound things essentially different, and which must have been known to be actually

different by those who used this language. It cannot be denied that the tonnage duty, or an impost on exports or imports may be levied under the name of pilot duties or penalties, and certainly *it is the thing and not the name which is to be considered.*"

This last sentence of the court furnishes the answer to the objection made by plaintiff in error, that the imposition here sought to be collected, must be considered as a *tax* because it is not specifically in the form of *tolls.* It seems to us to be of small importance as to what method may be adopted in collecting this compensation here claimed, if it is in substance and in fact merely no more than a fair charge for " *benefits conferred.*"

The powers of the City Council of the City of Chicago over the improvement and conservation of the Chicago river and harbor, have continued in all its charters and amendments to its charter since its first incorporation. And have been from time to time enlarged. The general Act of Incorporation approved April 10, 1872 (Rev. St. of Ill., Ch. 24), was adopted by the city of Chicago, April 23, 1875, as its charter, in pursuance of the provisions thereof. Some of the full and express powers given by that have been by us referred to.

Under the constitution of Illinois since 1848 and following the disastrous experience of its people on account of the indebtedness incurred by the state in the construction of the Illinois and Michigan Canal, the state has not had power to carry on public improvements. (Constitution 1848, Art. 3, Sec. 37.) By that section it is provided that appropriations may be made to meet the expenses of government, and may, to meet casual deficits or failures in revenues, the state may contract debts never to exceed in the aggregate $50,000; and that "no other debt, ex-
" cept for the purpose of repelling invasion, suppressing

"insurrection or defending the state in war, shall be con-
"tracted, unless the law authorizing the same shall at a gen-
" eral election have been submitted to the people and have
" received a majority of all the votes cast for members of
" the general assembly at such election." The same provision is continued in the present constitution. (Constitution 1870, Art. 4, Sec. 18.) It has been the public policy to leave such improvements as that of the Chicago river to the local municipal government. The power of the city of Chicago, therefore, in the premises, is the power of the State of Illinois.

II.

None of the cases cited by the learned counsel for plaintiff in error, (such as: *Moran* v. *New Orleans*, 112 U. S., 69; *Robbins* v. *Taxing District*, 120 U. S., 489; *Loop* v. *Mobile*, 127 U. S., 640; *Pullman Palace Car Co.* v. *Pennsylvania*, 11 Sup. Ct. Rep., 876; *Pickard* v. *Car Co.*, 117 U. S., 34; *State of Maine* v. *Grand Trunk Ry. Co.*, 12 Sup. Ct. Rep., 121), in any way involved the question of the right of the states (or of the local municipalities, under a grant of power from the state) to exact a compensation for the use of navigable rivers or harbors, within their limits, by them improved, from vessels or boats engaged in interstate commerce or enrolled and licensed under the acts of Congress. The line of decisions referred to by the learned counsel for plaintiff in error do not touch upon or in any way involve the principles involved in this case and laid down in the line of decisions in this court, of which *Huse* v. *Glover* and *Sands* v. *Manistee Co.* are examples.

III.

The learned counsel for plaintiff in error urges that the deepening of the Chicago river was done more in the interests of the larger vessels than in the interest of the tugs. It is not a question of comparative benefits to different kinds of vessels. And the improvement of the river by the city of Chicago has enabled the larger vessels make use of the tugs, and has given the tugs occupation by giving them the towage of these vessels of larger draft up the improved river. But this court will not inquire into the fact or amount of benefit conferred. It was alleged in *Huse* v. *Glover*, that the vessels of the complainant were damaged rather than benefited by the locks constructed in the Illinois river, for the use of which the complainant's vessels were compelled to pay tolls. But that question is not involved in the question of constitutionality, which is the only question before the court.

IV.

The learned counsel for plaintiff in error contends, however, that the fee demanded by the city of Chicago, in the ordinance in question, is not a toll or compensation for the use of the improved waterway; and that neither the ordinance nor the stipulation of facts shows that the license fee exacted by the ordinance is in any way connected with the deepening or improvement of the river.

We submit that the learned counsel is mistaken. The ordinance exclusively applies to the river, and to vessels using the Chicago river, and its branches and slips. It does not apply to the entire harbor. The city is not at-

tempting, by the ordinance, to exact any license fee from any tug or vessel making use of that portion of the harbor lying in Lake Michigan. This fact itself shows that the ordinance has in mind the particular waterway which has been improved by the City of Chicago. The stipulation of facts shows that the improvement of the river by the City of Chicago is one of the "ultimate facts" on which the right of the city to pass the ordinance is based. The connection between the license fee and the use of the improved waterway is as well defined as it was in the case of *Huse* v. *Glover*.

Counsel for appellant says the city has no authority from the state to construct canals and locks. As we have seen, it has the express authority "to construct and "keep in repair canals and slips for the accommodation of "commerce," as well as "to deepen, widen, dock, cover, wall, alter, or change the channel of water-courses"; and "to make regulations in regard to the use of harbors, and "towing of vessels"; and "to control and regulate the "anchorage, moorage and landing of all water craft and "their cargoes within the jurisdiction of the corporation." These powers plainly involve the power to provide means of carrying out these powers by the imposition of a reasonable charge as compensation for the use of the improved facilties thus furnished.

But the question of the corporate power of the city, under its charter and the grant of power therein contained, to impose a charge or license fee for these improved waterways, is a question of local law. It is a question as to the proper construction of the charter. That question is settled by the decision of the Supreme court in this case. The power to license includes the power to charge the license fee fixed by the ordinance.

Kinsley v. *City of Chicago*, 23 Ill., 359.

V.

There is nothing in the position of counsel for plaintiff in error that the powers given by the legislature of Illinois to the cities, to improve water-ways, is confined to waterways which do not lead into the Mississippi or St. Lawrence rivers, or those waterways which are not known as navigable waterways of the United States. In fact we know of no waterways in Illinois that can be regarded as lying entirely within the state, in that sense. If there are any, they are not worthy of mention. These provisions clearly refer to all waterways, and they had in mind particularly those municipalities which lie upon the Mississippi river and its tributaries, and Lake Michigan and the rivers leading into it.

VI.

Counsel for plaintiff in error say that this court, in the case of *Sands* v. *Manistee Co.*, 123 U. S., 288, 294, draw a distinction between tolls and taxes, or a license fee of the character of this under consideration in this case; and the learned counsel quote as follows:

"Taxes are levied for the support of the government, and their amount is regulated by its necessities. Tolls are compensations for the use of another's property, or improvements made by him, and their amount is determined by the cost of the property or the improvements, in consideration for the return which the value of those expenditures should yield."

The language here used, was used of the tolls imposed by an improvement company, a private corporation, authorized by the statute of the state to impose tolls for the use of improved waterways. This particular language

was not used of a case where a municipal corporation was, by legislation, imposing exactions for the use of an improved waterway. But applying this language in its most confined and narrow sense, the license fee here does not come within the definition of taxes as there laid down, but within the definition of toll—namely: compensation for the use of improvements (improvements in the river), made by the city of Chicago. There is nothing in this ordinance that indicates that this license fee is exacted for the support of the municipal government, or that its amount is regulated by the necessities of the municipal government. The license fee is imposed only upon vessels which are making use of the Chicago river, which has been improved by the city of Chicago.

VII.

The learned counsel for appellant says that it is evident from the decision in the case of *Huse* v. *Glover*, that the court did not consider that that case was analagous to the *Moran case*, or was in conflict with the principles laid down in the latter case. That is certainly true. The *Moran case* did not involve in any way whatever the question of the use of the waterway improved by the authority imposing the charge. It was a clear case of impost, within the meaning of the Constitution of the United States. If it had been the fact and had appeared in the record in the *Moran case* that the river in question (Mississippi river) lay entirely within the territorial limits and jurisdiction of the city of New Orleans, and that such city had, from time to time, at its own expense and for the purpose of promoting and facilitating its navigation, deepened the Mississippi river, the *Moran case* would have

been an entirely different case upon its facts. But those facts were entirely absent in that case, and their absence accounts for the fact that this court did not regard the Moran case as at all analagous to the case of *Huse* v. *Glover*.

The only distinction that the learned counsel for plaintiff in error can make between the cases of *Huse* v. *Clover* and *Sands* v. *Manistee Co.* and the case at bar, is that in those cases the compensation took the form of a toll, while in the case at bar it takes the form of a license fee, and counsel therefore conclude that the fact was more apparent in those cases that the charge imposed was intended as compensation for the improvement furnished than in the case at bar. But plainly the form in which the charge was made, whether an annual fee for each vessel using the river, or toll for each trip or passage, is entirely immaterial. That is a mere matter of convenience. Here is a requirement that each of these vessels using this improved waterway shall pay an annual license fee of $25. The charge is no less a compensation for the improvement in that form than if it were in the form of a toll for each passage up or down the river. Plainly in that sense the charge made is for the use by the vessel of the improved waterway. As this court said in *Cooley* v. *Wardens*, 12 How., 299, "it is the thing and not the "name which is to be considered."

VIII.

Plaintiff in error, in his argument, uses the following language:

"These tugs are engaged in interstate commerce, as much so as the vessels they are towing, and the regulation of them by license is a tax imposed upon inter-

state commerce as directly as it is possible to impose it." (Page 16.)

Also:

"The provisions of the General Acts of the State of Illinois are not necessarily repugnant to or in conflict with the Constitution of the United States, because if confined within legitimate bounds, they must be held to apply only to such waters as are within the boundaries of the state, and over which the general government has no jurisdiction.

"The act only transcends its legitimate and proper purpose when it encroaches upon the rights of navigagation granted under the federal constitution and laws to the public upon the navigable waters of the United States." (Pages 19 and 20.)

His conclusions are in conflict with the decisions of this court.

In the Escanaba case (107 U. S., 683), this court said:

"When its (the city's) power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the state and that of the federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to the legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are *Willson* v. *The Black Bird Creek Marsh Company*, 2 Pet., 245, decided in 1829, and *Gilman* v. *Philadelphia*, 3 Wall., 713, decided in 1865. * * *"

"On the other hand, where the subjects on which the power may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the state may be exerted for their regulation

and management until Congress interferes and supersedes it. As said in the case last cited: 'The uniformity of commercial regulations which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations, adapted to the immediate locality, could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act they may be regulated by state authority.' "

In the case of *Willson* v. *Black Bird Creek Marsh Co.*, (2d Pet., 245), Chief Justice MARSHALL said:

"The measure authorized by this act (of Delaware) stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware, and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several states.' If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks, into which the tide flows, and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying that a state law coming in conflict with such act, would be void. But Congress has passed no such act. The repugnancy of

the law of Delaware to the Constitution is placed entirely on its repugnancy to the power of Congress to regulate commerce with foreign nations and among the several states, a power which has not been so exercised as to affect the question."

Plaintiff in error contends that there is a distinction between the case at bar and the case of *Huse* v. *Glover*, because in that case it appeared that the Illinois legislature had passed a special act, authorizing the improvement of the Illinois river, while here no such legislation appears. In other words the gist of the objection is, as we understand it, *lack of authority on the part of the City of Chicago derived from the state* to control and regulate the use of the Chicago river within its municipal boundaries.

In the Escanaba case, this court found that the State of Illinois had authorized the city "to deepen, widen and "change the channel of the stream." (107 U. S., 681.)

The power of the city in this regard is so fully considered in the opinion of the Supreme court of Illinois that we shall not attempt further to review the same. We have also shown that the authority conferred upon the city by the legislature of Illinois is full and ample.

Plaintiff next contends that by the act of 1890, the Congress has assumed control of all navigable waters of the United States. We submit that that act does not affect the Chicago river. But that fact, if true, does not affect this case. These improvements by the city were previously made, and lawfully made. And the power of the state to improve waterways lying wholly within its boundaries is not entirely taken away. All that is required by the act of 1890 is that the approval of the secretary of war shall be first obtained. The act of Con-

gress, at most, only imposes that prerequisite on future improvement.

We submit that the judgment of the Supreme court of Illinois should be affirmed.

Respectfully submitted.

JOHN S. MILLER,
For Defendant in Error.